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ABSTRACT

The proceedings of a 1985 House of Representatives hearing to amend Section 615 of the Education of the Handicapped Act are presented. The hearing focused on questions of paying for attorneys fees in special education due process decisions. Statements are presented by representatives of policy makers, parents and professional associations regarding a proposed bill, the Handicapped Children's Protection Act of 1985. Statements are included from representatives of the National School Boards Association, the Association for Persons with Severe Handicaps, the Council for Exceptional Children, and the American Association of School Administrators. Among issues addressed are the need for mediation, the question of a cap on lawyers' fees, ways to reduce litigation, and parental frustrations in securing appropriate services for their children. (CL)

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HANDICAPPED CHILDREN'S PROTECTION ACT

ED266568

HEARING

BEFORE THE

SUBCOMMITTEE ON SELECT EDUCATION

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

H.R. 1523

TO AMEND THE EDUCATION OF THE HANDICAPPED ACT

HEARING HELD IN WASHINGTON, DC,
MARCH 12, 1985

Serial No. 99-9

Printed for the use of the Committee on Education and Labor

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CONTENTS

	Page
Hearing held in Washington, DC, on March 12, 1985	1
Text of H.R. 1523	2
Statement of:	
Arnold, Jean, attorney, Blacksburg, VA, representing the National School Boards Association	23
Galarza, Beverly J., San Antonio, TX	41
Roberts, Diana, a parent representing the Consortium for Citizens With Developmental Disabilities, accompanied by Joan Herrington, a parent	55
Weintraub, Fred, representing the Council for Exceptional Children	28
Wright, Linus, general superintendent of schools, Dallas, TX, representing the American Association of School Administrators	10
Prepared statements, letters, supplemental materials, et cetera:	
Arnold, Jean Bilger, board of directors, National Council of School Attorneys, Alexandria, VA, prepared statement on behalf of the National School Boards Association and NSBA Council of School Attorneys	25
Biaggi, Hon. Mario, a Representative in Congress from the State of New York, prepared statement of	55
Galarza, Beverly, San Antonio, TX:	
Letter to Hon. Steve Bartlett from Henry W. Christopher, Jr., attorney at law, San Antonio, TX, dated February 4, 1985, with enclosures	44
Prepared statement of	51
Roberts, Diana, parent, New York City, prepared statement presented by	58
The Association for Persons With Severe Handicaps, prepared statement from	66
The Council for Exceptional Children, represented by Frederick J. Weintraub, assistant executive director, Department of Governmental Relations, Reston, VA, prepared statement of	31
Wright, Linus, general superintendent, Dallas Independent School District, prepared statement of	15

HANDICAPPED CHILDREN'S PROTECTION ACT

TUESDAY, MARCH 12, 1985

HOUSE OF REPRESENTATIVES,
COMMITTEE ON EDUCATION AND LABOR,
SUBCOMMITTEE ON SELECT EDUCATION,
Washington, DC.

The subcommittee met, pursuant to call, at 1 p.m., in room 2261, Rayburn House Office Building, Hon. Pat Williams (chairman of the subcommittee) presiding.

Members present: Representatives Williams, Biaggi, Martinez, Bartlett, and Goodling.

Member also present: Representative Loeffler.

Staff present: Gray Garwood, staff director; Bob Silverstein, counsel; Colleen Thompson, clerk; and Pat Morrissey, minority counsel.

[Text of H.R. 1523 follows:]

99TH CONGRESS
1ST SESSION

H. R. 1523

To amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain prevailing parties, to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 7, 1985

Mr. WILLIAMS (for himself, Mr. BARTLETT, Mr. BIAGGI, Mr. MURPHY, Mr. KILDEE, Mr. MARTINEZ, Mr. OWENS, Mr. ECKART of Ohio, Mr. HAYES, Mr. JEFFORDS, Mr. BOUCHER, and Mr. GOODLING) introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain prevailing parties, to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Handicapped Children's Protection Act of 1985".

SEC. 2. AWARD OF ATTORNEYS' FEES.

Section 615(e)(4) of the Education of the Handicapped Act (hereinafter in this Act referred to as "the Act") is amended by inserting "(A)" after the paragraph designation and by adding at the end thereof the following:

"(B) In any action brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees and other expenses as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

"(C) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party eligible to receive an award under this subsection and which indicates the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of such party stating the actual time expended and the rate at which fees and other expenses are computed.

"(D) The court, in its discretion, may increase the amount to be awarded to the prevailing party pursuant to this subsection if the court finds that the local or State educational agency or the intermediate educational unit has engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy or the court

may reduce the amount to be awarded or deny an award if it finds that the prevailing party engaged in such conduct.

"(5) For purposes of this subsection—

"(A) the term 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorneys' fees;

"(B) fees awarded under this subsection shall be based on prevailing market rates for the kind and quality of services furnished; and

"(C) fees and other expenses awarded under this subsection to a prevailing party may not be paid with funds provided to the State under the Education of the Handicapped Act.".

SEC. 3. EFFECT OF EDUCATION OF THE HANDICAPPED ACT ON OTHER LAWS.

(a) EFFECT ON OTHER LAWS.—Section 615 of the Education of the Handicapped Act is amended by inserting at the end thereof the following new subsection:

"(f) Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes prohibiting discrimination.".

(b) REGULATIONS UNDER SECTION 504 OF THE REHABILITATION ACT.— Section 504 of the Rehabilitation Act of 1973 shall be carried out in accordance with regulations under such section in effect on July 4, 1984.

SEC. 4. IMPROVEMENTS IN PROCEDURAL SAFEGUARDS UNDER THE ACT.

(a) PUBLIC ACCESS TO HEARING DECISIONS.—Section 615(d)(4) of the Act is amended by inserting "shall be made available to the public consistent with the requirements of section 617(c) and" after "decisions".

(b) INFORMAL COMPLAINT RESOLUTION PROCEDURE.—Section 615(b)(2) is amended—

(1) by striking out the first sentence and inserting in lieu thereof the following:

"Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall be provided an opportunity to meet informally with the State or local educational agency or intermediate educational unit to resolve the complaint. If the complaint is not resolved satisfactorily or a decision is made not to meet informally, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency, the local educational agency, or an intermediate educational unit as determined by State law or by the State educational agency."; and

(2) by inserting at the end of such paragraph the following new sentence:

"Any decision regarding participation in an informal meeting under this paragraph shall not affect the availability or provision of any rights of the parents or guardian under this section.".

SEC. 5. EFFECTIVE DATE.

(a) GENERAL PROVISION.—Except as provided in subsection (b), the provisions of this Act shall take effect on the date of enactment of this Act.

(b) LIMITED RETROACTIVE APPLICATION.—The amendments made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings under such section brought prior to July 4, 1984, which were pending on July 4, 1984.

Mr. WILLIAMS. Good afternoon. This hearing by the Subcommittee on Select Education is now convened.

Before we begin, I would like to welcome my colleagues on the subcommittee. As many of you know, I am the incoming chairman of this subcommittee, although I have been a member of it for some years now. We have much business to conduct in the coming years and I look forward to this opportunity to work with my colleagues on the subcommittee in these several efforts.

Today's hearing is important for several reasons. It deals with an important substantive area which we will consider shortly, but I hope this hearing sends three important signals to those of you who are concerned about efforts under the jurisdiction of this subcommittee. First, the subcommittee is committed to preserving the rights of handicapped children. Second, I believe this hearing illustrates that members of the subcommittee are committed to a bipartisan approach in addressing issues and problems that arise in any program under our jurisdiction. Third, I believe that the way in which H.R. 1523 has been drafted indicates my commitment to working with all groups who have concerns about the particular issue the subcommittee is addressing.

Today we will hear testimony from parents, school officials, representatives of the disability community and from a practicing attorney. The subject of this hearing, of course, is the Handicapped Children's Protection Act of 1985, the bill that I introduced last week.

It is important to point out that I was joined by my colleagues from both sides of the aisle in introducing this legislation, and that the text of this bill reflects weeks of dialog with representatives of various groups interested in the content of this legislation.

The Handicapped Children's Protection Act seeks to reestablish important rights repealed by the Supreme Court and to improve the due process procedures available to handicapped children under the Education of the Handicapped Act. The Court's decision last year in *Smith* v. *Robinson* had the effect of repealing important statutory rights Congress had intended to be available to handicapped children.

The Court ruled that parents who prevailed in litigation against a public education agency were not eligible to recover the costs of such an action. This decision does not maintain the careful balance that the legislation and judicial decisions had created prior to *Smith* v. *Robinson*. Instead, the Court has undone this balance by creating a state of imbalance and confusion regarding the rights and responsibilities of both parents and schools.

I know of no school official who would willfully act against the interests of handicapped children. I know of no parent who would willfully seek to force schools to bear unnecessary costs. Schools and parents both seek to do what is right. I am convinced of that, and yet, this decision by the Court has had the effect of turning schools and parents each against the other.

Let's look at the facts. In the 1983–84 school year, only 1 child in every 3,000 was involved in the first level due-process hearing and only 1 out of every 65,000 handicapped children was involved in actual litigation. That is less than two-thousandths of 1 percent. So most schools and most parents must be in agreement.

Specifically, our legislation allows the award of reasonable attorney fees for parents who are the prevailing party in a suit. It does not provide fees for administrative proceedings which, under the bill, must be exhausted in appropriate circumstances before the parent files suit.

It also requires school districts to offer parents an opportunity to resolve complaints informally before proceeding to the more formal administrative proceedings. In addition, it would require that decisions handed down by school districts and the State education agency be made available to the public.

Finally, H.R. 1523 reaffirms the Office of Civil Rights' role in investigating complaints of handicap discrimination under section 504 of the Rehabilitation Act of 1973. It does not chart new ground; it simply restores the careful balance between parent and education agency that Congress intended to be in place.

We look forward to having the good counsel of the witnesses today.

The gentleman from Texas, my friend who I am delighted to have as the ranking member on this committee, Mr. Bartlett.

Mr. BARTLETT. Thank you, Mr. Chairman.

Mr. Chairman, I would like to begin my remarks by complimenting the new chairman, Pat Williams, of the Subcommittee on Select Education, for his efforts in developing H.R. 1523 into a bipartisan bill. We have discussed proposed bill language in great detail and the version introduced reflects a truly joint product. I look forward to working with the chairman on future legislative initiatives.

I anticipate that our initial collaboration in drafting H.R. 1523 will serve as a sound basis for bipartisan cooperation during the remainder of this Congress.

This hearing is important not only because it allows a full review of the attorney's fees issue, but also because it allows us to recognize the effectiveness of the current due process system, or the administrative hearings, currently under Public Law 94-142. The system is working. It is clearly demonstrated by data provided by the National Association of State Directors of Special Education.

For example, consider these facts for the school year 1983-84, a year in which over 4 million handicapped children benefited from Public Law 94-142. 1,462 first-level hearings were conducted, 67 of the 1,462 resulted in litigation. Seven States accounted for 71 percent of the first-level hearings.

Between the school year 1979-80 and school year 1983-84, first-level hearings dropped by some 39 percent for a sample of 34 States.

H.R. 1523, in its present form, will complement and perhaps strengthen the impressive record of Public Law 94-142 due process system. When the Handicapped Children's Protection Act was originally introduced in Congress last July 1984 during the 98th Session of Congress, I was very concerned about both the substance of the bill and the lack of time to give it full consideration.

Congress, and I think the public, needed time to review multiple complex issues. I believe that H.R. 1523 is a much improved version of the original Handicapped Children's Protection Act because

we have had the time to digest the implications of possible statutory provisions, to talk with each other about our common and unique concerns, and most importantly, to hear from parents of handicapped children and from school officials.

The wording of H.R. 1523, it seems to me, is not, nor should it be, set in concrete. The chairman and I agree that the testimony we hear today may suggest ways in which H.R. 1523 could be improved. It represents, however, a solid foundation upon which to make such improvements.

Let me give four illustrations. One, it limits legal representation to a parent, a guardian, or a surrogate parent, the person who is most concerned about and committed to the welfare of the handicapped child. It requires that fees and expenses be awarded only for court-related actions, not actions associated with administrative hearings. This tends to delitigize the process and controls, to some extent, costs associated with disputes and limits diversion of scarce resources from the primary business of the schools, which is educating children.

It requires that hearing records be made public and, finally, it requires that parents be afforded an opportunity to meet informally in some sort of a mediation process, to meet informally with school personnel to resolve the differences so that perhaps the formal due process hearings may be avoided. These several provisions are constructive additions.

Three issues were not addressed in H.R. 1523, and I anticipate they will be fully addressed in the committee report. They include a strong statement of congressional intent reflecting the importance of compliance with Public Law 94-142 due process. They include a statement urging the courts to distribute equitably between local and State education agency the obligation to pay the fees and expenses of the attorneys in a statement directing the courts to award fees to a prevailing parent in proportion to the substantive nature of his or her claim.

I have one residual concern. I would hope that the testimony we hear today and that is submitted for the record will guide us in reaching reasonable limits on expenses. As introduced, the H.R. 1523 provision related to expenses such as witness fees and report costs may appear to be totally open-ended, although I believe the Federal courts will have substantial discretion and jurisdiction.

In closing, I would like for this hearing to serve as the opening dialog on how we might reduce the confrontational encounters we sometimes see, not often, but we sometimes see, between parents and school personnel and to forge a renewed partnership between them on behalf of handicapped children.

Second, I would like it to serve as the opening dialog on the disciplining of handicapped students in schools. We must address this issue at some time, perhaps not in this bill, but at some time.

Thank you, Mr. Chairman.

Mr. WILLIAMS. The gentleman from Pennsylvania.

Mr. GOODLING. I have some questions, but I will ask them later.

Mr. WILLIAMS. Fine.

I will ask the first panel, Mr. Wright, Ms. Arnold, and Mr. Weintraub, to come to the hearing table.

I understand, Mr. Bartlett, that you would like to introduce one of these witnesses.

Mr. BARTLETT. Mr. Chairman, I would like to introduce the first witness, Linus Wright, the superintendent of the Dallas Independent School District, and I appreciate the chairman's indulgence.

Superintendent Wright has a flight to catch in order to meet with his school board this evening, a function which he says he is always present for and he will be present for today. I am privileged to introduce to the subcommittee one of—he is my constituent—the foremost educators in the Nation. The Dallas Independent School District has 128,000 students. It is a leader and a model for the State of Texas and the Nation in a number of areas, including in the field of special education.

Linus Wright has been superintendent of the Dallas Public Schools for 6 years; he is committed to the principle of providing quality education opportunities for all students and he has worked consistently for that goal.

I welcome Superintendent Wright to this subcommittee.

Mr. WILLIAMS. Mr. Wright, if you will take the microphone, you may proceed. We know that you have transportation that you need to be on time for and so we will hear your testimony first.

STATEMENT OF LINUS WRIGHT, GENERAL SUPERINTENDENT OF SCHOOLS, DALLAS, TX, REPRESENTING THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS

Mr. WRIGHT. Chairman Williams, members of the subcommittee, it is a pleasure to be here with you today. My name is Linus Wright and I am superintendent of the Dallas Independent School District, and I am also speaking on behalf of the American Association of School Administrators, whose membership numbers about 18,000 administrators of public school districts throughout the United States.

I welcome the opportunity to appear before you today to present my views and those of my colleagues in regard to the Handicapped Children's Protection Act of 1985. I want to make it very clear from the very beginning that our views support those just expressed by the chairman, that there is absolutely no desire to sidestep our obligation to provide appropriate and educationally sound learning opportunities for handicapped students.

In fact, the Dallas Independent School District has been one of the leaders in providing excellent services for special education students throughout the years.

There are some real challenges in this regard. However, they could be alleviated by minor changes in the law. I believe that the draft bill is moving in the right direction and I would like to recommend some modifications. These I will attempt to point out to you as succinctly as I possibly can this afternoon.

The point is frequently made that only 10 percent of U.S. school districts are involved in litigation involving special education students. That doesn't sound like a lot, however, when you consider that 11 percent of the Nation's school districts serve 65 percent of the students, then these figures become less dramatic. Then add to that

the fact that that 11 percent doubtlessly enrolls in the vast majority of special education students in the entire Nation.

So parents with profoundly handicapped children frequently move to Dallas for one reason: To get their children enrolled in the Dallas schools; to get their children enrolled in exceptional programs, programs with a great reputation.

In addition to the large number of handicapped students that we normally get just because of our size, we also get many who come specifically for special education classes. Also, consider that 55 percent of all the special education students in Texas are enrolled in 8 school districts, out of 1,100.

A major concern, particularly for big city districts, is the fact that there is no differentiation of different handicapping conditions in the funding formulas at the State or the national level. A school district receives exactly the same dollar allotment to provide for a child who stutters or one who requires catheterization, tube feeding, diaper changing, or what have you. When you consider that more than 65 percent of the severely and profoundly handicapped youth are enrolled in urban school districts, then you can readily see the problem that we face.

Obviously, we and other urban districts have a large stake in any legislation pertaining to special education.

Most litigation in regard to special education is in three areas: One, in the placement of students; two, in related services; and three, in discipline. The question that I ask you to consider, what are the underlying causes of this litigation? I think we need to look at these three main questions in this regard.

First, why should a parent of a special education student have the right to demand that a public school district pay for placement in an expensive private institution when the service is offered in the public schools, especially since other parents do not have the same right?

What I am saying here is that if appropriate placement is provided in the public schools, placement should not be open to litigation. Some parents request residential and private school placement for their children at public expense because they want the best for their child. Often, however, they do not recognize that provision of appropriate, not best, is the responsibility of the schools under the law.

In addition, the obligation to provide residential opportunities when appropriate raises a significant constitutional protection concern. Special education must be provided for students from 3 to 21 years of age. At the present time, a child study team composed of parents, assessment specialists, teachers, and school administrators can place a child in a facility away from home at public expense for a span of those years without any further procedural review.

If you think about it, that really falls in the range of the incredible. I would contend that placement in an institution away from home is the significant deprivation of liberty. It should be reviewed by a court of competent jurisdiction if the placement exceeds 1 year.

Second, where does education stop and health care begin? There has been a fusion of education and health needs with no clear line of demarcation determining which services prevail. Oxygen ther-

apy, catheterization, respiratory and suction devices, and physical therapy are just some of the services educators are called upon to provide.

One DSID student is brought in each morning on a stretcher and lies comatose throughout the instructional day. Another student—listen to this—one student has central nervous disorder with seizures, multiple medications and irrigating solutions required with several complex steps required; asthma and associated respiratory problems, totally dependent in all self-care areas, nonambulatory, nonpurposeful movements, Pampers, nutrients fed directly into a tube placed through abdominal and intestinal wall via timed, 24-hour infusion drip, feeding required 13 complicated steps—and listen to these instructions—among the feeding problems was "In case the tube comes out, stop the feeding, cover the opening on her stomach, and call her mother." That is a real-life case in the Dallas Independent School District.

Third, my question is: Where do the special education student's rights end in discipline cases and the rights of school personnel and other students to function in a violent-free educational-conducive environment begin?

The Office of Civil Rights ruling on discipline and the response to section 504 of the Vocational Rehabilitation Act of 1973 says that any change of placement automatically triggers the admission, review and dismissal, or the ARD process as we commonly refer to it, of hearings and due process procedures. Any time a special ed student is suspended from class for more than 3 days, an alternate education plan must be provided.

This involves holding an ARD committee meeting which must recommend alternative plans. Normally such a committee would consist of teachers, principals, an educational diagnostician, a nurse, a student counselor, a psychologist, and the parents.

Just to give you an idea of some of the complexities involved in special education discipline cases, let me give you a few examples. A retarded student with a history of violence was assigned to a room by himself with an off-duty fireman that was hired to teach him. The boy beat the fireman to a pulp and I don't have to tell you that this was an adult.

We have had to hire a permanent substitute for another student on an every-day basis. This additional cost is about $50 a day just to isolate the student from his classmates and regular teachers so he won't physically assault them, as he has on many past occasions.

Another profoundly retarded boy has an inoperable tumor, literally crowding out his brain. We placed him in a private school. The first day, he ripped the toilet seat off and wrapped it around the director's head. They refused to accept him anymore, and so at this point, we can't find a public, private, or State institution that will accept the boy. So we have no alternative but to assign him to one of our classrooms.

Now, don't think for a minute that some of the students don't understand the situation well enough to take advantage of it. I think this is a point that we need to remember. A teacher was told

by one student, "I am covered by special ed and you can't do a thing to me."

It also should be pointed out, however, that the special education student is also at a disadvantage. Take an assault of another student, for example, a nonhandicapped student. It would immediately go to a third party hearing in our district to determine the guilt or innocence, but in the case of the handicapped student, the ARD committee must decide if the child's action relates to his or her handicapping conditions.

There is no opportunity for the child's innocence or guilt to be determined. It is just assumed that the handicapped child is guilty. But adding to the overall dilemma is the lack of specificity in defining the meaning of various handicapping conditions. A good example is the term "learning disabled". Approximately 75 percent of all special education students in Texas are either classified as "learning disabled" or "speech-handicapped".

This high percentage, no doubt, is a result of the very broad definition that is given for learning disabilities. This encourages the identification of students as learning disabled who perhaps do not really belong in special education in the first place. This proliferation of students diagnosed as learning disabled has the effect of reducing the amount of expenditures for more severely handicapped conditions and needs.

One elementary school I know of in Texas has 21 resource room teachers for learning disabled students, simply to demonstrate the disproportionate identification.

Let's talk about attorney fees for a minute. Awarding a winning plaintiff's attorney's fees ushers in a whole host of problems and problem areas. First of all, this would encourage lawsuits in this area with a predictable increase in cases.

The astounding rise in civil rights suits in the last few years is an excellent predictor in this regard. One of the most unfortunate aspects is the fact that once the attorneys are involved, mediation becomes more difficult. When both sides bring in attorneys, an automatic adversarial relationship immediately is birthed.

Also, when attorneys are aware that fees are available, they are just not as interested in resolving the problem. In fact, they are much more likely to draw out the process, rather than make any valid attempt to seek a speedy solution. The bottom line is that this delay is detrimental to the child, since it is critical for appropriate placement to be made as soon as possible.

Still another angle is the fact that legal expenses mount up quickly, and a small school district, in particular, having to pay large attorney fees for the plaintiff, besides the defense counsel can very well result in having to take needed and basic educational services away from other students.

If attorney fees are permitted, however, a cap is definitely needed. Any reasonable fee must be defined and in all fairness, if litigation expenses are to be awarded to the prevailing plaintiff, they also should be awarded to the school district should it prevail. While some would claim that this would have a chilling effect on parents pursuing justice for their children, it would undoubtedly have the effect of parents making every effort to solve the problem and reconcile the differences before going to court.

46-120 O - 85 - 2

An extremely important point that I would like to make is that mediation should be built into the process with the requirement that parents or guardians be required to go through every step before seeking the court route. In other words, it should be shown that everything possible has been done in good faith to resolve the complaint.

I would like to mention the problem of administrative overload which we are experiencing with the multiple problem-solving process for parental concerns at the present time. Parents have four recourses outside the school district: One is an independent hearing officer that is appointed by the State and by the school district; second is a complaint resolution section of the State education agency; third is the Civil Rights Office; and fourth is the Federal courts.

The problem is that a parent can take all four courses simultaneously without the agency involved being aware of the multiple action being taken. This causes confusion and forces the school district to provide the same information over and over again to four different sources.

There is also the problem of abuse of the process since a parent can appeal over and over again with the exception to the Federal court. What is needed is a mandatory information-sharing process limiting appeals to one agency at a time.

In summary, I would like to mention the main point that I have spoken to this afternoon. First is that litigation in special education comes primarily in three areas: One, the placement of students; two, related services; and, three, in discipline areas.

The underlying causes in these cases may be capsulized in three realms: First, placement should not be open to litigation if appropriate placement is provided by the local school district; second, where does education stop and health care begin; and, third, where do the special education student's rights end in discipline cases and rights of school personnel and other students to function in a violent-free environment begin?

Awarding winning plaintiff's attorney's fees bring forth a host of problems and I would like to mention four specifically. Special education-related lawsuits would be encouraged. It is projected there would be more lawsuits in this area in litigation in the rest of this decade than any other single area. Attorneys spark an immediate adversarial relationship and make mediation more difficult.

Third, that providing fees would encourage attorneys to extend the process, rather than resolve the issue, thereby delaying appropriate educational placement of the child.

Having to pay exhorbitant legal expenses prohibits the school district from providing the very best educational opportunity for other students.

Despite these considerations, if attorney's fees are provided, a cap should be required and reasonable fees clarified. Also, attorney fees should be available to school districts if the school district is the prevailing party.

Mediation is a must to be built into the process with the parent, guardian, and the school district required to seek resolution of the problem step by step at every level before taking the legal path.

I commend the committee in the direction they are taking in H.R. 1523. I think it is a direction that we should be going in and I hope that we can add to the solution to the problem.

Thank you, sir.

[Prepared statement of Linus Wright follows:]

PREPARED STATEMENT OF LINUS WRIGHT, GENERAL SUPERINTENDENT, DALLAS INDEPENDENT SCHOOL DISTRICT

My name is Linus Wright, and I am superintendent of the Dallas Independent School District. I am also speaking on behalf of the American Association of School Administrators whose membership numbers about 18,000 administrators of public school districts throughout the United States. I welcome this opportunity to appear before you today and to present my views and those of my colleagues in regard to the Handicapped Children's Protection Act of 1985.

I want to make it very clear from the very beginning that there is absolutely no desire to sidestep our obligation to provide appropriate and educationally sound learning opportunities for handicapped students. In fact, the Dallas Independent School District has been one of the leaders in providing excellent services for special education students throughout the years.

There are some real challenges in this regard, however, that could be alleviated by minor changes in the law. I believe that the draft bill is moving in the right direction, but I would like to recommend some modifications. These I will attempt to point out to you as succinctly as possible this afternoon.

The point is frequently made that only 10 percent of U.S. school districts are involved in litigation involving special education students. That doesn't sound like a lot. However, when you consider that only 11 percent of the Nation's school districts serve 65 percent of public school students, that figure becomes less dramatic. Then, add to that the fact that that 11 percent doubtless enrolls the vast majority of special education students in the entire Nation.

Parents with profoundly handicapped children frequently move to Dallas for one main reason—to get their children enrolled in the Dallas schools. Our programs have an excellent reputation, so, in addition to the large number of handicapped students we would normally get because of our size, we also have a great many who come here specifically for these classes. Also, consider that 55 percent of all special education students in Texas are enrolled in only the eight largest school districts.

A major concern, particularly for big city school districts, is the fact that there is no differentiation for different handicapping conditions in the funding formula at the State and National levels. In other words, a school district receives exactly the same dollar allotment to provide for a child who stutters as one who requires catherization, tube feeding, diaper changing and what have you. When you consider that more thatn 65 percent of the severely and profoundly handicapped youth are enrolled in urban school districts, you can readily see the problem we face.

Obvioulv we and other urban school districts have a large stake in any legislation pertaining to special education.

Most of litigation regard to special education is in three main areas: placement of students, related services and discipline. The question that I ask you to consider is "What are the underlying causes of this litigation?" We need to look at three main questions in this regard.

1. First, why should a parent of a special education student have the right to demand that a public school district pay for placement in an expensive private institution when the service is offered in the public school, expecially since other parents do not have that same right? What I am saying here is that, if appropriate placement is provided in the public school, placement should not be open to litigation. Some parents request residential and private school placement for their children at public expense because they want "the best care for their child." Often, however, they do not recognise that the provision of "appropriate" not "best" is the responsibility of the schools under the law.

In addition, the obligation to provide residential opportunities when appropriate raises a significant constitutional protection concern. Special education must be provided for students 3–21 years of age. At the present time, a child study team, composed of parents, assessment specialists, teachers and school administrators, can place a child in a facility away from home at public expense for the span of those years without any further procedural review. If you think about it, that really falls in the range of incredible. I would contend that placement in an institution away

from home is a significant deprivation of liberty that should be reviewed by a court of competent jurisdiction if the placement exceeds one year.

2. Secondly, where does education stop and health care begin? There has been a fusion of educational and health needs with no clear line of demarcation determining which service prevails. Oxygen therapy, catheterization, respiratory and suction devices, physical therapy, evoked response audiometry are just some of the services educators are called on daily to provide. One DISD student is brought in each morning on a stretcher and lies comatose throughout the instructional day.

Another student had the following problems: central nervous system disorder with seizures; multiple medications and irrigating solution required with seven complex steps required; asthma and associated respiratory problems; totally dependent in all self-care areas, non-ambulatory, no purposeful movements, pampers; and, nutrients fed directly into tube placed through abdominal and intestinal wall via times, 24-hour infusion drip. Feedings required 13 complicated steps.

Among the feeding problems mentioned was, "in case the tube comes out, stop the feedings, cover the opening on her stomach and call her mother."

3. My third question is: "Where do the special education student's rights end in discipline cases and the rights of school personnel and other students to function in a violent-free, educationally-conducive environment begin?"

The Office of Civil Rights ruling on discipline is a response to section 504 of the Vocational Rehabilitation Act of 1973. Any change of placement automatically triggers the admissions, review and dismissal or ARD process, hearings and due process procedures. Any time a special ed student is suspended from class for more than three days, an alternate educational plan must be provided. This involves holding an ARD committee meeting which must recommend the alternative plan. Normally such a committee would consist of teachers, the principal or his or her representative, an educational diagnostician, the nurse, the student's counselor and a psychologist. The parents or guardians are also invited to attend this meeting.

Just to give you some idea of the complexities involved in special education discipline cases, let me give you a few examples.

A retarded student with a history of violence was assigned to a room by himself with an off-duty fireman hired to teach him. The boy beat the fireman to a pulp. And you know what superior physical condition a fireman must be in.

We have had to hire a permanent substitute for another student every day. That's $52 a day we're spending above the usual amount to isolate this student from his classmates and regular teacher so he won't physically assault them as he has on several past occasions.

Another profoundly retarded boy has an inoperable tumor literally crowding out his brain. We placed him in a private school. The first day, he ripped the toilet seat off and wrapped it around the director's head. He has literally destroyed the sheetrock throughout the school by kicking it in. It's little wonder that the school's board of directors will no longer accept him—at any price. We have exhausted every possible State and community resource. Our only choice now is to assign him to a DISD classroom.

And don't think for a minute that some of the students don't understand the situation well enough to take advantage of it. A teacher was told by one student. "I'm covered by special ed, and you can't do a thing to me."

It also should be pointed out, however, that the special education student is also at a disadvantage. Take assault of another student, for example. A non-handicapped student would immediately go to a third party hearing to determine his or her guilt or innocence. In the case of the handicapped student, though, the ARD committee must decide if the child's action relates to his or her handicapping condition. There is no opportunity for the child's innocence or guilt to be determined. It is just assumed that he or she is guilty.

Adding to the overall dilemma is the lack of specificity in defining the meaning of various handicapping conditions. A good example is the term "learning disabled." Approximately 75 percent of all special education students in Texas public schools are either classified as learning disabled or speech handicapped. This high percentage, no doubt, is a result of the very broad definition that is given for learning disabilities. This encourages the identification of students as learning disabled who perhaps do not really belong in special education in the first place. This proliferation of students diagnosed as learning disabled has the effect of reducing the amount of expenditures for more severe handicapping conditions and needs. One elementary school I know of, for example, has 21 resource room teachers for learning disabled students.

But let's talk about attorney fees for a few minutes. Awarding winning plaintiff's attorneys' fees ushers in a whole host of problems and problem areas.

First of all, this would encourage law suits in this area with a predictable increase in cases. The astounding rise in civil rights suits in the last few years is an excellent predictor in this regard.

One of the most unfortunate aspects is the fact that, once attorneys are involved, mediation becomes more difficult. When both sides bring in attorneys, an automatic adversarial relationship immediately is birthed.

Also, when attorneys are aware that fees are available, they are just not as interested in resolving the problem. In fact, they're much more likely to draw out the process rather than make any valid attempt to seek a speedy solution. The bottom line is that this delay is detrimental to the child, since it is critical for appropriate placement to be made as soon as possible.

Still another angle is the fact that legal expenses mount up quickly. In a small school district, in particular, having to pay large attorney fees for the plaintiff besides its own defense counsel can very well result in having to take needed and basic educational services away from other students.

If attorney fees are to be permitted, however, a cap is definitely needed, and reasonable fees must be defined. And in all fairness, if litigation expenses are to be awarded to the prevailing plaintiff, they also should be awarded to the school district, should it prevail. While some would claim this would have a chilling effect on parents pursuing justice for their children, it would undoubtedly have the effect of parents making every effort to solve the problem and reconcile the differences before going to court.

An extremely important point I would like to make is that mediation should be built into the process with the requirement that parents or guardians be required to go through every step before seeking the court route. In other words, it should be shown that everything possible has been done in good faith to resolve the complaint.

I would like to mention a problem of administrative overload which we are experiencing with the multi-problem solving process for parental concerns at the present time. Parents have four recourses outside the school district: an independent hearing officer, the complaint resolution section of the State education agency, the Office of Civil Rights under section 504 of the Vocational Rehabilitation Act of 1973 and the Federal court. The problem is that a parent can take all four courses simultaneously without the agencies involved being aware of the multi-action being taken. This causes confusion and forces the school district to provide the same information over and over. There is also the problem of abuse of the process, since a parent can appeal again and again—with the exception of the Federal court. What is needed is a mandatory information sharing process limiting appeals to one agency at a time.

In summary, I would like to mention the main points I have spoken to this afternoon.

SUMMARY

Most litigation in regard to special education is in three main areas: placement of students, related services, and discipline.

The underlying causes in these cases may be capsulized in these three realms:

1. Placement should not be open to litigation.
2. Where does education stop and health care begin?
3. Where do the special education student's rights end in discipline cases and the rights of school personnel and other students to function in a violent-free environment begin?

Awarding winning plaintiff's attorneys' fees brings forth a host of problems.

1. Special education-related law suits would be encouraged.
2. Attorneys spark an immediate adversarial relationship and make mediation more difficult.
3. Providing fees would encourage attorneys to extend the process rather than resolve the issue, thereby delaying appropriate educational placement of the child.
4. Having to pay exorbitant legal expenses prohibits a school district from providing the very best educational opportunity for all students.

If, despite these considerations, attorney fees are permitted, a cap should be required and reasonable fees clearly defined. Also, attorney fees should be available to the school district if it is the prevailing party.

Mediation needs to be built into the process with the parent or guardian required to seek resolution of the problem step-by-step at every level before taking the legal path.

Thank you for allowing me to appear before you this afternoon and for your thoughtful consideration of these points.

Mr. WILLIAMS. Thank you, Mr. Wright.

Again, because of your time constraints, I will ask the other members of the committee if they have questions of you now before we proceed to the other members of the panel.

Mr. Bartlett.

Mr. BARTLETT. Thank you, Mr. Chairman.

Let me ask Mr. Wright, I very much appreciate your testimony and really you are helping bring a dose of the real world to the Halls of Congress where sometimes we don't perceive as accurately as we ought to the result of some of the laws that we pass.

I have some specific questions for you as to how things both work today and would work, in your opinion, under this bill. First of all, in the broad range of prevailing parties, as you know, this bill, as does most Federal law, would say—at least this one is limited to only if the prevailing party is the parent—but would define "prevailing" party under the current Federal Court interpretation, that only the prevailing party would be allowed the reimbursement of fees.

I suppose my question is, has it been your experience that, in layman's terms, that you really have to prevail? You and I had discussed in the past that sometimes that school board appearing to prevail and yet having to pay the attorney's fees anyway. Do you have any way of characterizing that for us or describing in what situations your school district has prevailed on the substance of the lawsuit and still had to pay both sides' legal fees?

Mr. WRIGHT. I can only speak from experience, Congressman Bartlett. In areas of special education and Federal Courts, as well as desegregation, each time the district has prevailed, they have still ended up paying the legal services for the plaintiff. So it is pretty difficult, and in many cases, Federal judges will try to mediate a case themselves and, even though it might be ruled in favor of the district, the plaintiff's attorney's fees are still paid.

It is hard to understand, from a layman, what "prevailing" means because we have always paid the plaintiff's fees, even when it was ruled that the district prevailed.

Mr. BARTLETT. The school district might be able to give some help to this committee in terms of trying to provide some precise remedy to that, at least in the area of 94-142, to where I think it is the intent of this committee, and my intent, that if a parent prevails on the case, well, then, the school board or the State, depending on who was the party most responsible, would pay the attorney's fees, but we might want to tighten up how to define "prevailing" party.

I need to ask you also on what you described as the reasonable fees. What has been your experience as far as paying attorneys their reasonable fees? Has it been in the market that has generally prevailed?

We had one suggestion at one time that we limit reasonable fees or fees to $75 an hour as a matter of Federal law to try to get at that. Have you generally found fees to be the fees charged in the marketplace, or what is your experience?

Mr. WRIGHT. It is hard to determine what the marketplace is, and what area of law, and what caliber of lawyer, and what the marketplace is for lawyers. I know fees in Dallas run from $50 to $200 an hour and I don't want to degrade a profession, but I have

had instances where judges have awarded $50 an hour and I have had other instances in the same situation where they awarded $200 an hour. So, again, I would like to see the Congress, in its wisdom, establish some reasonable market fee and $75 a hour for this type of litigation certainly seems reasonable. It seems to be a balance, and I keep hearing us talking about balance and it is what we are trying to do, reach a compromise that both parties can agree on.

Mr. BARTLETT. If we can't do that—and maybe we still can—but if we can't do that, perhaps the Congress could help to define what our intent is as far as perhaps requiring that the attorney prove up what his rate is in a case such as that. I don't believe—at least in my experience, and I think in yours—that is not the case as far as having to prove it or is it?

Mr. WRIGHT. It is just that the judge has arbitrarily established it in many cases without having to prove it up.

Mr. BARTLETT. What is your total—what is Dallas Independent School District's total legal bill for both your attorneys and the attorneys of plaintiffs?

Mr. WRIGHT. For the last 5 years, it has run from $500,000 to $800,000 a year.

Mr. BARTLETT. To as much as $800,000 a year?

Mr. WRIGHT. As much as $800,000 a year.

Mr. BARTLETT. How many teachers could you hire for that?

Mr. WRIGHT. I could hire 30 more teachers a year with that.

Mr. BARTLETT. On the mediation component, one of the things that we are discussing is to essentially give a parent the required right of mediation prior to the due process. Would you welcome that kind of a right, where a parent could—perhaps even extend it to both sides—but build in—do you find that mediation helps the process or hurts the process if you have a mediation prior to the due process?

Mr. WRIGHT. I think it helps the process and we have understanding in Dallas with the Office of Civil Rights that we will try to mediate every complaint that is made. Previously, whenever a complaint was made, the Office of Civil Rights would conduct an investigation and let us know 1 year later, after a lot of cost and expense, what their decisions are, but we worked out a gentleman's agreement that we would try to mediate all of the complaints in special education and civil rights, and for the last 2 years, we have mediated every single complaint to the satisfaction of both parties.

Mr. BARTLETT. For that last 2 years since you began mediation, you mediated every single complaint?

Mr. WRIGHT. Hasn't been a single complaint that had to go back to a full investigation or to a lawsuit.

Mr. BARTLETT. To the satisfaction of the parents——

Mr. WRIGHT. To the satisfaction of the parent and the school district.

Mr. BARTLETT. One last question: I wonder if you could elaborate the impact of not being able to have a standard disciplinary process for handicapped students. Could you elaborate on the impact that has on the handicapped students themselves? It is obvious the inconvenience and such to the school district, but do you find a negative or positive impact on the handicapped students who are denied the discipline?

Mr. WRIGHT. It is negative, both to the student and the parent and the teacher because both sides are frustrated. First, the student never has the knowledge or the parent of the student, the rightness or wrongness of the act and you never deal with the modification of the behavior for the benefit of the child. You simply deal with whether it is affected by the condition that the child has.

On the teacher's side, it frustrates the teacher in that they know that the child realizes in many instances that they haven't been disciplined, that nothing is going to happen, so a teacher continues to work in that world of frustration saying, "Well, what is the use? There is not anything that I can do to correct the situation," so it is bad for both sides.

Mr. BARTLETT. When you speak of handicapped students, what—can you give us the range or what level of handicap is the biggest problem with regard to inability to impose discipline?

Mr. WRIGHT. Well——

Mr. WILLIAMS. Mr. Wright, I would encourage you to give a brief answer to this last question. Mr. Bartlett's time has expired.

Mr. WRIGHT. Yes, sir.

Primary to those that are identified as learning disabilities and speech handicap and 75 percent of the students are in that area, and certainly with the mental facilities to know the difference in right and wrong.

Mr. BARTLETT. Thank you, Mr. Chairman.

Mr. WILLIAMS. Mr. Goodling.

Mr. GOODLING. Thank you, Mr. Chairman.

Mr. Wright, usually when we make decisions, we make the best decisions if we use the heart and the head both. I am a late signer to this—I would probably confess it may have been more heart than head—with the understanding that, as a matter of a fact, it is a darned sight better than what the Senate has to offer at the present time, and that we would work toward trying to improve what is now before us.

I have two major concerns, I guess. We have a responsibility—it seems to me our major responsibility in relationship to education from the Federal Government is equal access, access for students for a good education, no matter who they are, where they live, what their income is. That brings me to part of my problem with this.

I can't think of any legislation that we have passed where a parent's income isn't somehow involved in what participation the Federal Government plays. Here it would appear to me that whether your income is $50,000, $75,000, or $100,000 or whether it is a poverty-level income, you would have an equal opportunity to receive this reimbursement and I have some real concern with that. I think we surely have a responsibility for those that we do when we talk about free and reduced-price lunches; when we talk about guaranteed loans and things of that nature. But I have some real problems at the present time and I was just thinking that as I was listening to you with the thought that everyone should have equal opportunity no matter what their income may be to get this kind of reimbursement.

When you talked about limiting fees, would it be better to limit a—to say a percentage or to set a maximum or exactly how would you do that?

Mr. WRIGHT. It is not going to be easy to do either one, to set a market fee of what is in the community. Legal fees are higher in my sister city of Houston here than they are in Dallas. I have been told that they are.

Also, it is hard to set a maximum because you don't know the severity of the case. So it is not going to be easy to do, but I do think that there should be something in the bill that would encourage reasonableness on the part that it is in the best interest of the student and not drag a case out, as I was inferring that sometimes attorneys have a tendency to do.

So I think on past experience of particular cases, you might be able to draw some conclusion as to how many days trial time, preparation time, might be a reasonable amount for a certain kind of case, as well as an hourly rate. I think both of those might be negotiated and you might have a little difficulty with the legal society in doing that, but I think in the best interests of parents and students, it could be done and should be considered.

Mr. GOODLING. I guess the only other concern I have is that I want to make sure that we don't do anything that would not encourage parents and school districts to work together and talk together in the best interest of the child. I don't want to do anything that would start you out on an adversarial relationship before you ever even have an opportunity to see if you can't work something out.

Mr. WRIGHT. That is why I think that the mediation is so important because when you go through the mediation process, it is going to become obvious whether you can reach a consensus or not and then I think it gives the parent clear direction of whether they want to pursue the legal route. That is why then, after you have gone through that, should the parent be wrong—and most times they are right—then I think the district needs some protection as well. That is why I said the district should be considered if they are prevailing party because sometimes attorneys will encourage their client to go on regardless. Under the circumstances, they sometimes do that. We are only interested as an association and as the superintendent of Dallas in doing what is best for the child and we also have to think about the school district and the people paying the bill as well.

I don't want to do anything—neither does the association—to hinder a parent from following procedural due process and every opportunity that is open to them.

Mr. GOODLING. Thank you, Mr. Chairman.

Mr. WILLIAMS. The gentleman from California, Mr. Martinez.

Mr. MARTINEZ. I have no questions, Mr. Chairman.

Mr. WILLIAMS. Mr. Wright, you mentioned legal fees in your response to a question by Mr. Bartlett, legal fees from your district being between half a million and $800,000 a year?

Mr. WRIGHT. Yes, sir.

Mr. WILLIAMS. The last school year, in the entire State of Texas, not just your district, there were 12 of these matters brought to

first-level mediation. None reached litigation. What was the reason for that half-a-million-dollar expenditure in your district?

Mr. WRIGHT. It is the area of terminations, first amendment rights and terminations, desegregation law primarily.

Mr. WILLIAMS. Do you know what the costs were of the mediation or litigation of this matter?

Mr. WRIGHT. In special education? We haven't had any in the last 2 years. I just responded that we have been able to mediate every issue through the Office of Civil Rights and—let me correct. We did settle out of court for one $5,000 claim for a special education child in a search situation.

Mr. WILLIAMS. You mentioned that despite the fact that the districts had prevailed, they nonetheless had to pay fees. Did the courts find that the district had prevailed or was the decision fuzzy enough that it is your interpretation that the district prevailed?

Mr. WRIGHT. In the case of the search, the district did prevail, but we ended up settling just to keep from going ahead and trying.

Mr. WILLIAMS. The court did not mandate that the fees were yours? The court in that instance?

Mr. WRIGHT. Mandated that we negotiate a settlement.

Mr. WILLIAMS. You mentioned in your testimony that placement decisions should not be open to litigation, and yet it seems to me that the appropriateness of a particular placement proposed by a school district really goes to the heart of Public Law 94-142 with regard to protection of the parents.

Now, if the parents can't challenge a particular placement, what good is the act?

Mr. WRIGHT. I am talking about appropriate placement versus best.

Mr. WILLIAMS. Well, if they can't challenge what you believe is appropriate placement and they believe is inappropriate placement, where is the act? What protection do they have under this law? Are you going to determine what is appropriate placement and parents not be able to question that?

Mr. WRIGHT. There is a committee made up of parents, teachers, psychologists, diagnosticians, and administrators who determine what is appropriate placement and once that is agreed upon, then to challenge it—and then it is determined by the courts that it is appropriate—then I think we have wasted a lot of time and expense because we often get into what a parent wants and what the professionals have agreed is appropriate, and I think there is where the difference is.

Yes, a parent should have the right to pursue it even beyond a committee, but all I am saying is if you have a group of professionals that have agreed that that is appropriate placement and then they go on with litigation and it is still upheld by the courts that it is appropriate, then I think the school district should be entitled to the expenses for that litigation.

Mr. WILLIAMS. You mention in your testimony, quoting now: "Once attorneys are involved, mediation becomes more difficult and in fact, they are much more likely," you say, "to draw out the process rather than make any valid attempt toward a speedy solution."

How does it benefit parents to ever permit or encourage their attorneys to delay resolution of a complaint?

Mr. WRIGHT. It doesn't benefit the parents or the child. That is the point. I am saying that sometimes attorneys advise their clients to draw it out, take it to court, and all it is doing is hurting and delaying the placement of the child, when possibly the school district could mediate the problem with the parent.

Once an attorney is brought in, and particularly if both attorneys get involved, it really becomes an adversarial relationship.

Mr. WILLIAMS. It seems to me, if I may say, Mr. Wright, that we are really on the margin of questioning attorneys' ethics here and I guess one can do that privately, but I don't know that we ought to bring the heavy hand of the law down based on our own personal judgments of unethical attorneys.

Mr. WRIGHT. I wouldn't want to do that for the world. I am sitting next to one here that I think a great deal of, but——

Mr. WILLIAMS. Well, we appreciate having your testimony and you will notice we have had you out of here in time to catch your plane. We appreciate your counsel and you being here today.

Mr. WRIGHT. Thank you, sir. I appreciate the opportunity to be here.

Mr. WILLIAMS. Ms. Arnold, you may proceed.

STATEMENT OF JEAN ARNOLD, ATTORNEY, BLACKSBURG, VA, REPRESENTING THE NATIONAL SCHOOL BOARDS ASSOCIATION

Ms. ARNOLD. Thank you, Mr. Chairman, and members of the committee.

My name is Jean Arnold, and as Mr. Wright indicated, I am an attorney from Blacksburg, VA. I am present today as a representative of the National School Boards Association and the National Council of School Attorneys.

We thank you for the opportunity to comment on this legislation and to work so closely with the committee staff on the bill. The staff, in our opinion, has done an excellent job on this very important piece of legislation. This is a particularly important subject for me, as I have specialized in the area of education for the handicapped law for the past 8 years.

I was formerly employed by the law firm of Brycewell & Patterson in Houston, TX, where I worked with school districts in ensuring compliance with the Federal statutes governing the education of handicapped children. I served for 2 years as chairman of the board of directors of Advocacy, Inc., the protection and advocacy system for the State of Texas.

I have also represented parents in due process hearings; I have served as an impartial due process hearing officer in Texas as a time when five hearing officers served the entire State; I have since traveled to a number of States to conduct hearing officer training sessions; I now teach a graduate course for Virginia Polytechnic Institute & State University, as does my fellow panelist, Mr. Weintraub, entitled "Legal Aspects of Educating Handicapped Children." I currently represent a number of school districts in special education matters, and I am the daughter of a handicapped in-

dividual. My mother lost her vision entirely when I was 4 years old.

You have our written testimony. We would like to request that that be put in the record.

Mr. WILLIAMS. Without objection. All written testimony will be included as part of the record.

Ms. ARNOLD. Thank you.

I will address the major concerns of the National School Boards Association by referring to the nine-point statement of specifications which represent the intent of this committee that was given to us. We will comment on each of the nine quickly.

Our primary concerns revolve around items No. 1 and No. 6, which deal with sections 2(b) and 3(a) of the proposed legislation.

First, on point No. 1, we support your intent to award attorneys fees incurred during the judicial proceedings in these actions and not those incurred during the administrative process. However, the language of the bill does not do this.

You have made it clear that only a judge, as opposed to a hearing officer, can award the fees, however, the limitation on the fees to be awarded is not in the bill. You say in your specs that the fees are for litigation only, but the bill does not contain that limitation. This specific limitation language needs to be in the bill itself.

Our second major concern is with item 6. Your specifications provide that parents exhaust administrative remedies and not skip them in favor of some other statute, but the statutory language as drafted does allow parents to bypass the 94-142 process, which is, as you know, specifically designed as the mechanism for assuring the provision of a free appropriate public education for handicapped children.

When a child has special education needs, he or she is entitled to an individualized educational program and a large number of other procedural safeguards under 94-142. In our written testimony on page 2, we list some of these procedures and that list is not comprehensive.

NSBA believes in these procedures and we also believe that parents and school districts must be required to follow them.

The relationship of parents and school districts was stressed in the legislative history of Public Law 94-142 when Senator Jennings Randolph spoke, calling the cooperative effort between parents and schools the most important part of the act. It has recently been stressed by the U.S. Supreme Court in the case of *Rowley* v. *Hendrick Hudson Central School District,* where they talk about the importance of parental involvement in the process.

We, as school systems, do not want to be precluded from the opportunity of receiving information about a handicapped child from the parents who have information that we cannot receive from anywhere else. We don't want the parents to bypass the Public Law 94-142 process by jumping into the filing of a Federal complaint with, for instance, the Office of Civil Rights.

I want to stress that if the right to file a complaint with the Federal Government is essential to assuring a handicapped child's right to an education, then we don't want to see that right taken away. We just want to assure that the process already set up under 94-142 is utilized.

Skipping down to point No. 9, regarding informal meetings with parents, we understand the frustrations that have been expressed to the committee regarding the procedures under 94-142 and the apparent effort to delegalize the process, but we feel that this section is redundant with the procedures already existing under 94-142. In order to make the administrative proceedings even more workable, we would rather see some alternative language used in that section, and we would be glad to work with you on that.

Going back to point No. 2, the National School Boards Association has no problem with that point.

Point No. 3, concerning delaying the procedures, we think that is a very good idea and we would support that.

Point No. 4, regarding the definition of fees and other expenses, in this regard, we would prefer to see the committee adopt similar language to that used in other pieces of civil rights legislation, for instance, section 1988, simple language that says the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

On point No. 5, we have no problem.

Point No. 6, I have already discussed.

On point No. 7, we could not understand why the entire law was not made retroactive. Additionally, we felt that there should be some cutoff date to how far back a party could go. For instance, could a case that was resolved in 1979 and attorney's fees denied by the court, could that case be reopened on the question of attorney's fees?

Finally, on point No 8, we are in support of that provision regarding disclosure of hearing results.

We thank you for the opportunity to comment on this legislation and we would be glad to respond to any questions you might have.

[Prepared statement of Jean Arnold follows:]

PREPARED STATEMENT OF JEAN BILGER ARNOLD, BOARD OF DIRECTORS, NATIONAL COUNCIL OF SCHOOL ATTORNEYS, ALEXANDRIA, VA, ON BEHALF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND NSBA COUNCIL OF SCHOOL ATTORNEYS

PREFACE

My name is Jean Bilger Arnold and I am a member of the Board of Directors of the NSBA Council of School Attorneys. Under the aegis of the National School Boards Association, the Council of School Attorneys was organized in 1969 to provide a national forum on the practical legal problems faced by local public school districts and the attorneys who serve them. The Council has more than 1900 members, with representatives from almost every state and the District of Columbia.

The National School Boards Association is in its 44th year of service, its membership including the 50 state school boards associations, the nation's local school boards, and the Council of Urban Boards of Education and the Council of School Attorneys.

I. INTRODUCTION

The NSBA Council of School Attorneys and the National School Boards Association are honored to present their views on the proposed handicapped Children's Protection Act before this subcommittee.

We reaffirm out support of the Educational for All Handicapped Children Act (the EHA) which has enabled our public schools to provide an appropriate education to handicapped school children. In enacting this statute to protect the right of handicapped students to public educational services, Congress properly recognised that the states could not bear the entire financial cost of such an undertaking. Thus, under the EHA states may qualify to receive federal funds for the education

of the handicapped if they comply with the conditions set forth in the law. One of the most crucial of these conditions requires a recipient of funds under the EHA to establish a process to develop individual educational plans (IEPs) for each handicapped child and to provide parents of a handicapped child an opportunity to challenge any plan they believe inappropriate to their child's needs.

II. THREAT TO IEP AND DUE PROCESS PROCEDURES

A. Benefits of current cooperative process

The IEP process and the due process procedures as required by the EHA reflect congressional intent to provide a mechanism for early and informal resolution of issues concerning the availability of a free appropriate public education to each handicapped child. Congress intended the development of an IEP to be a cooperative effort, wisely recognizing that the needs of handicapped children are best accommodated by encouraging parents, schools and other education and therapeutic professionals to work together to formulate an individualized a plan that is appropriate to the child's educational needs. In the event that a child's parents are not satisfied with the school's proposed plan, they may seek to resolve their differences through the comprehensive scheme of due process procedures and protections that the Act accords them including:

The right to obtain an independent educational evaluation of their child; written notice before any changes in the child's placement or program are implemented; the opportunity for an impartial due process hearing by the local education agency; impartial review by a state education agency; and, the right to judicial review, where necessary.

B. Availability of attorney's fees at administrative hearing level

NSBA believes that the pre-litigation procedures established by the EHA should be allowed to remain informal and cooperative in nature so that parents and school personnel can work toward mutually acceptable resolutions of any disagreements in as expeditious a manner as possible. We urge you to avoid enacting any amendment to the handicapped law which would tend to produce polarization between parties and an adversarial approach to determining educational issues.

the current language of the proposed amendment (Sec. 2(B)) does not adequately shield the EHA's informal mechanism for determining a handicapped child's educational needs from becoming an adversarial process overwhelmed by legal complications that postpone final resolution of the dispute and result in a disservice to the handicapped child in securing an appropriate education. Whenever there is the possibility of recovering legal fees, the presence of attorneys inevitably increases. This is why NSBA and the Council oppose legislation to provide legal fees at the administrative level.

We appreciate your sensitivity to this issue. However, although the avowed purpose of the provision is to make attorney's fees available only for litigation costs and not for fees incurred in seeking administrative remedies, the currently proposed language could be interpreted to permit a court to award attorney's fees for the legal costs associated with administrative hearings. The language simply states that the court may make an award of attorney's fees to a prevailing party in any action brought under the subsection providing for judicial review. This does not necessarily restrict the award to costs attributable to court proceedings.

The language could reasonably be interpreted to indicate that, although only a court, as opposed to a hearing officer, has authority to make awards of attorney's fees; the award is not limited to fees incurred for representation in court. Since the intent of the provision is to limit a court's discretion to making awards only for litigation costs, additional clarification is needed.

This is especially true when it is considered that some courts, prior to the U.S. Supreme Court decision in *Smith* v. *Robinson*, awarded attorney's fees for work done in connection with administrative hearings held under the EHA. See, *Department of Education* v. *Valenzuela*, 524 F.Supp. 261 (D. Hawaii 1981); *Gary B.* v. *Cronin*, 542 F.Supp. 102 (N.D. Ill. 1982); *Turillo* v. *Tyson*, 535 F.Supp. 557 (S.R.I. 1982). While it is true that other courts have determined that attorney's fees are not available for the costs of administrative hearings, the fact that any court decided prior to the enactment of any attorney's fees provision under the EHA that prevailing parties can recover the legal costs of administrative hearings, demonstrates the necessity of language that unambiguously limits the recovery of fees to the costs incurred at the judical review stage.

The disagreement of courts over whether attorney's fees should be awarded for costs associated with administrative hearings hinges on their differing conclusions

as to the applicability of the Supreme Court decision in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), to the Education for All Handicapped Children Act. In *Carey* the Supreme Court held that "§§ 706(f) and 706(k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complianant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII."

Courts that have awarded attorney's fees for the costs incurred at administrative hearings held under the Act have reasoned that since the EHA, like Title VII, requires parents to first exhaust their administrative remedies before seeking judicial relief, then prevailing parties under the EHA are also entitled to recover legal fees for the costs of proceedings to which they must submit under the federal statute before going to court. It is not implausible to assume that other courts without the benefit of congressional guidance on this issue will find the Supreme Court's reasoning in *Carey* applicable under the Handicapped Children's Protection Act. In order to avoid any confusion on this issue, we strongly suggest that the present proposed language be modified to reflect clearly the intent to limit a court's discretionary authority to awarding fees only for the costs incurred during the litigation phase of any dispute arising under the Education for All Handicapped Children Act.

III. RELATIONSHIP BETWEEN EDUCATION FOR ALL HANDICAPPED CHILDREN ACT AND SECTION 504 OF THE REHABILITATION ACT

NSBA urges the Committee to clarify the meaning of Section 3(a) of the Handicapped Children's Protection Act. The Act should reflect congressional intent to require that parents and guardians not bypass by means of Section 504 the administrative procedures under the EHA when the latter statute applies. NSBA further requests that the bill be clarified to provide that handicapped student plaintiffs may resort to Section 504 only where the EHA does not protect the rights of and provide remedies to the handicapped individual. If Section 504 is simply a superfluous claim that adds nothing to a handicapped child's substantive right to a free appropriate public education, then handicappped plaintiffs should be limited to seeking relief under the EHA. To provide otherwise would allow handicapped plaintiffs to forego the administrative procedures in the EHA and file a complaint, either with OCR or a court, under Section 504.

Because the EHA is also a funding statute, the presently proposed language also permits a handicapped complainant to seek relief for grievances which are essentially disputes over the appropriate educational placement of a child by requesting that the Office of Civil Rights (OCR) of the Department of Education take action on an alleged Section 504 violation while also petitioning the Department's Bureau of Education (BEH) to investigate a complaint under the EHA. Such dual jurisdiction over what is essentially one claim is inconsistent with congressional purposes in enacting the EHA and furthermore represents poor management of Department resources in times demanding the utmost in fiscal responsibility. It also places an unnecessary, additional burden upon school districts that must respond to investigations by both offices of essentially the same facts.

NSBA, of course, does not propose that OCR's jurisdiction over handicapped claims should be totally eliminated but it should be restricted to claims that fall outside the coverage of the EHA. As noted above, the EHA establishes comprehensive measures that give full protection to the rights of handicapped children to a free appropriate public education. If a child's parents decide to bring allegations before a federal agency that their child has not been accorded this right by a local or state educational institution, the proper entity to investigate such a claim is BEH, not OCR.

This does not preclude OCR from exercising jurisdiction over all grievances that might be brought by handicapped plaintiffs raising education issues. There are situations in which Section 504 would apply and the EHA would not. A closer look at Section 504 will demonstrate when this could occur.

Section 504 is designed to assure that federal funds are not used to support programs and activities which discriminate against handicapped persons. There was no debate in the Congress on the provision and no committee reports exist to more fully develop the intent of Congress in passing the section. However, the Department of Education regulations under Section 504 indicate that the provision is designed, at least in the context of education, to fill the gap where states such as New Mexico which until recently had refused funding under the EHA. See, 34 C.F.R. 104.36 (comment).

Section 504 is broader than the EHA in that, to fall within its bounds, a child must have "a physical or mental impairment which substantially limits one or more

major life activities." The EHA definition, in contrast, is keyed to whether the child is in need of special education. If, for example, the only "handicap" of a student is being afflicted with severe facial disfigurement or a disease such as "herpes", he or she would be "handicapped" under Section 504 but not under the EHA.

Additionally, Section 504 is broader than the EHA in that it applies to all federal grantees, including transportation systems, hospitals, colleges, and universities, etc., not just elementary and secondary schools.

Section 504 is also narrower than the EHA because it prohibits discrimination, but does not make affirmative requirements. *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979). Questions involving the two measures merge in the primary and secondary education context only because states that receive EHA funding must create an array of services so as to provide some program from which each handicapped child can benefit. Identifying that program is much the same as determining appropriateness. Section 504 might be a basis for a claim where a child is completely excluded from school without opportunity for any of the administrative protections in the EHA, but where the claim relates to the "appropriateness" of the program or services, EHA is the sole remedy. *Timms* v. *Metropolitan School District*, No. 82-3084 at n. 4 (7th Cir. Nov. 18, 1983).

Under Section 504, if the district does not make such efforts on behalf of non-handicapped students, it is irrelevant that the district never contacted the parents, never looked at the reports of the parents' independent evaluator, never gathered together the district's personnel to establish an IEP, etc. Certainly, under section 504, parents need not be consulted before a change in placement is made, although the EHA requires not just consultation but consent.

There are also substantial differences in the due process requirements of section 504 and the EHA. Since section 504 is a non-discrimination statute, handicapped students are entitled only to the same due process procedures provided to non-handicapped students, i.e., those required under *Goss* v. *Lopez*, 419 U.S. 565 (1975) and its progeny. The same is true under the United States Constitution and, thus, 42 U.S.C. 1983. However, EHA goes farther than Section 504 and requires a full-scale hearing before an independent hearing examiner, the right to counsel and substantive rights such as due process hearing before a change in placement is made if the parents and district disagree as to placement.

The point is that handicapped plaintiffs who are asserting claims of a violation of their right to a free appropriate public education are fully protected by the provisions of the EHA and do not need recourse to section 504 except in those instances where the EHA clearly does not apply.

IV. CONCLUSION

What NSBA is asking you to do in regard to the Handicapped Children's Protection Act is to clarify through modification of presently ambiguous language some of the asserted purposes of this bill and to place appropriate limitations upon the use of Section 504 which make good management sense while assuring handicapped children of the rights that the EHA accords them. These changes, we believe, will work to the benefit of both school districts and the handicapped children they serve by ensuring that the IEP process and administrative hearing procedures remain an informal, cooperative effort to secure educational placements and services that are satisfactory to all.

NSBA and the NSBA Council of School Attorneys offer whatever services they can render to this subcommittee and other members of Congress in shaping a statute that will reflect these goals.

Mr. WILLIAMS. Thank you very much.

Mr. Weintraub.

STATEMENT OF FRED WEINTRAUB, REPRESENTING THE COUNCIL FOR EXCEPTIONAL CHILDREN

Mr. WEINTRAUB. Mr. Chairman and members of the committee, I am Fred Weintraub, assistant executive director of the Council for Exceptional Children, and on that regard, represent 50,000 persons involved in the education of handicapped children throughout the United States and Canada. We commend the subcommittee for introducing H.R. 1523 and expeditiously scheduling this hearing.

CEC played a major role in working with Congress in the design and passage of 94-142 and for the past decade, we have worked actively throughout the country to assist in its implementation. Last July, we reacted, along with many others, with shock at both the logic and implications of the Supreme Court's decision in *Smith* v. *Robinson*. We, along with others, call upon the Congress to take corrective action.

The bill introduced last year by this body went beyond simply correcting *Smith* v. *Robinson* by the fact of permitting attorney's fees to be awarded under 94-142, instead of section 504. Because of this new issue, we urged the Congress last year to carefully examine the issues before taking action and we commend you for taking that approach.

As part of our ongoing examination of this issue, we formed a task force to explore in greater detail the issues raised by the court. A copy of the report of this task force is attached to our statement.

In designing 94-142, the Congress recognized that simply guaranteeing handicapped children access to an education was not sufficient to meeting the children's educational needs. Thus, it chose to guarantee a free appropriate public education.

Congress also realized that each child's special educational needs would be different, and thus a single standard, or even multiple standards, defining appropriate would not suffice. The Congress, with great wisdom, established a process approach to determine what is appropriate.

The essentials of that approach are: One, that there is a determination of what a child's special educational needs are and what services will be provided must be made around the individual needs of that child; two, that parents and schools have an equal interest and opportunity to participate in resolving the question of what is appropriate for the child; and, three, that when parents and schools disagree, that there be a fair process available to resolve differences in the best interest of the child. It is our belief that the process approach on the whole is effectively working.

The issue before the subcommittee today, precipitated by *Smith* v. *Robinson*, is how to assure the existence of fair procedures to resolve differences in the best interests of the child when the parties cannot agree, and I commend both the ranking and minority ranking members for their comments relating to the degree in which there is disagreement. There is very little disagreement out there, but we must have procedures to resolve disagreement when it does exist.

In this regard, we have identified four overriding principles: One, that Federal policy should assure that there is an effective balance between the rights and responsibilities of parents and those of the schools; two, that Federal and State policy, including fiscal policy, should encourage the resolution of disagreements between parties in the shortest period of time and in the most cost-effective manner for all parties concerned; three, that the rights of individual professionals must also be considered in a manner equal to the rights of parents in the schools; and, four, that while utilization of the courts and participation of the legal community is an essential right possessed by all parties, policies should not encourage or

weigh in favor of legal resources as opposed to other forms of complaint resolution.

In addressing these issues, it is essential that we keep in mind several points. First, the question is not whether parents or schools are right, the issue is what is appropriate for the child. We must presume that both parents and schools are equally committed to that objective.

Second, the educational needs of handicapped children exist in the present, and protracted disputes may often be counterproductive to the educational interests of the child.

Third, the process under 94-142 is a human interaction system designed to make educational decisions within a legal framework. The most critical ingredient to effective decisionmaking is communication and trust. While legal processes are the central rights of all parties, it should not become a substitute for more appropriate strategies for facilitating communication and trust.

In regard to H.R. 1523, CEC takes the following view: We support the awarding of attorney's fees under 94-142 when parents prevail in court. In this regard, we support the view that the court should have discretion as to whether fees should be awarded and that the amount of the fees should be based on the nature of the issue, the behavior of the parties and factors related to reasonable cost.

Second, we support restoring the relationship between 94-142 and section 504.

Third, we support making available alternative strategies for resolving differences between parties as long as such strategies do not subvert the rights of the parties involved or unduly protract effective decisionmaking.

Fourth, we support requiring that hearing decisions and State appeal decisions be made available to the public with appropriate confidentiality protections for parents, children, and professionals.

Fifth, we support prohibiting the use of 94-142 program funds for the payment of attorney's fees awarded under this act.

I would briefly like to address two issues that are not presently contained within the bill. First, we believe that States must play a more active and qualitative role in the process if we are going to reduce the need for litigation and encourage better decisions early in the process. We must remember that under 94-142, States are responsible for assuring the free appropriate public education of handicapped children. In all States, either the State conducts the hearing, or the hearing is conducted by the local school district then there is an avenue for review by the State. Thus, in all cases where the process is utilized, the decision that goes to the court is a decision that has either been made by the State or reviewed by the State.

If the courts overturn the decision of the State, then it is obvious that the State was either in error on procedural or substantive grounds. For this reason, we believe that if we want to reduce litigation, if we want to speed up better decisions on behalf of children, then what we want to do is encourage the State to conduct their business in a better manner.

For this reason, what we suggest is that the committee examine the issue of where the court overturns the decision of the State, that it is, in fact, the State that is held financially liable for its de-

46-120 O - 85 - 3

cisions, instead of placing that financial liability on the back of the school district.

Second, while the process system is the appropriate means for resolving disputes, some issues arise that can be resolved through other avenues if the parties involved knew that they existed and if those other avenues operated in an efficient and effective manner.

An example of this is the complaint procedure which exists under the Education Department's General Administrative Regulations, better known in Washington parlance as EDGAR. Under this procedure, an individual or organization that believes that the requirements of the law of 94-142, or any other education law, are not being carried out can complain to the State, who is then obligated to investigate and resolve the complaint.

We believe that a number of the issues that presently are tied up in the costly and time-consuming process of the due process procedures under 94-142 could be resolved by a simple complaint to the State under the EDGAR procedures. However, why isn't this going on? One is that the public, particularly parents, are generally unaware that this procedure exists. Second, the Office of Special Education has generally not provided guidance to the States on how this procedure should be operative. Third, the States generally do not have this procedure effectively in operation.

We would urge the subcommittee to encourage the Department of Education to strengthen the EDGAR procedures, to force them also to work with States to make sure that these procedures are in place and, in fact, the parents know they exist and know how to use them so that some of the things that go into due process might be more expeditiously resolved.

Thank you, Mr. Chairman, and we stand ready to work with the committee.

[Prepared statement of Fred Weintraub follows:]

PREPARED STATEMENT OF THE COUNCIL FOR EXCEPTIONAL CHILDREN, REPRESENTED BY FREDERICK J. WEINTRAUB, ASSISTANT EXECUTIVE DIRECTOR, DEPARTMENT OF GOVERNMENT RELATIONS, RESTON, VA

Mr. Chairman and members of the Committee: I am Fred Weintraub, Assistant Executive Director for Governmental Relations of The Council for Exceptional Children. The Council for Exceptional Children (CEC) is the national professional organization of persons involved in and concerned about the education of handicapped and gifted and talented children and youth. We commend the Subcommittee for introducing H.R. 1523, the Handicapped Children's Protection Act of 1985, and expeditiously scheduling this hearing to consider this most important legislation.

The Council for Exceptional Children played a major role in working with the Congress in the design and passage of P.L. 94-142, The Education for All Handicapped Children Act of 1975. For the past decade we have actively worked throughout the country to assist in the implementation of this most important Act. Last July, we reacted, along with many others, with shock at both the logic and implications of the Supreme Court's decision in *Smith* v. *Robinson* which fundamentally severed the relationship between P.L. 94-142 protections and the protections under Section 504 of the Vocational Rehabilitation Act of 1973 and potentially other civil rights statutes. We, along with others, called upon the Congress to take corrective action. H.R. 6014 introduced by this body last year went beyond simply correcting *Smith* v. *Robinson* by restoring the relationship between P.L. 94-142 and Section 504, but also for the first time permitting attorney's fees to be awarded under P.L. 94-142 directly. Because of this new issue, we urged the Congress to carefully examine the issues before taking action.

As a part of our ongoing examination of this issue CEC formed a Task Force on *Smith* v. *Robinson* to explore in greater detail the issues raised by the court's deci-

sion and to make recommendations concerning federal and state policy issues that should be addressed. A copy of this report is attached to this statement.

During the years leading up to the passage of P.L. 94-142, the Congress thoroughly explored the problems associated with educating handicapped children. The Congress recognized that simply guaranteeing handicapped children access to an education was not sufficient in meeting the children's educational needs; thus it chose to guarantee a "free appropriate education." Congress also realized that each child's special educational needs would be different and thus a single standard or even multiple standards defining appropriate would not suffice. The Congress with great wisdom established a process to determine what is appropriate. The essentials of that approach are:

1. The determination of what a child's special educational needs are and what services will be provided must be made around the individual needs of that child.
2. That parents and schools have an equal interest and opportunity to participate in resolving the question of what is appropriate for the child.
3. That when parents and schools disagree there be fair procedures available to resolve differences in the best interests of the child.

It is our belief that the process approach is on the whole working effectively. The Rand Corporation (1982) in studying the process reported that fewer than 0.01 percent of the students served under the EHA become the subject of a formal dispute. While, as our Task Force report indicates, there are some factors that presently constrain parents and schools from the level of advocacy envisioned in the law, in the vast majority of cases parents and schools are working together to reach mutually agreeable determinations of "free appropriate public education."

The issue before the Subcommittee today, precipitated by *Smith* v. *Robinson*, is how to assure the existence of fair procedures to resolve differences in the best interests of the child when the parties can not agree.

In this regard our Task Force identified four overriding principals:

1. Federal policy should assure that there is an effective balance between the rights and responsibilities of parents and those of the schools.
2. Federal and state policy, including fiscal, should encourage the resolution of disagreements between parties in the shortest period of time and in the most cost effective manner for all parties concerned.
3. The rights of individual professionals must also be considered in a manner equal to the rights of parents and the schools.
4. While utilization of the courts and participation of the legal community is an essential right possessed by all parties, policy should not encourage or weigh in favor of legal resources as opposed to other forms of dispute settlement.

In addressing these issues it is essential that we keep in mind several points. First, the question is not whether the parents or the schools are "right." The issue is what is appropriate for the child and we must presume that both parents and schools are equally committed to that objective. Second, the educational needs of handicapped children exist in the present and protracted disputes may often be counter productive to the educational interests of the child. Third, the process under P.L. 94-142 is a human interaction system designed to make educational decisions within a legal framework. The most critical ingredient to effective decision making is communication and trust. While legal process is an essential right of all parties it should not become a substitute for more appropriate strategies for facilitating communication and trust.

More specifically, in regard to H.R. 1523 The Council for Exceptional Children:

1. Supports the awarding of attorney's fees under P.L. 94-142 when parents prevail in court. In this regard, we support the view that the court should have discretion as to whether fees should be awarded and that the amount of the fees should be based on the nature of the issue, the behavior of the parties and factors related to reasonable costs.
2. Supports restoring the relationship between P.L. 94-142 and Section 504 of the Vocational Rehabilitation Act of 1973.
3. Supports making available alternative strategies for resolving differences between parties as long as such strategies do not subvert the rights of the parties involved or unduly protract effective decision making.
4. Supports requiring that hearing decisions and state appeal decisions be made available to the public with appropriate confidentiality protections for parents, children, and professionals.
5. Supports prohibiting the use of P.L. 94-142 program funds for the payment of attorney's fees awarded under this Act.

There are two other issues that we urge the subcommittee to take into consideration. First, states must play a more active and qualitative role in the process if we

are to reduce the need for litigation and encourage better decisions early in the process. In most states when there is a disagreement between the parties a local hearing is initiated, which either party can appeal to the state. In some states the hearing is held by the state. Following a state hearing or appeal either party may go to court. In all instances the state makes a determination and it is this determination that is at issue in court not that of the local school district. If courts overturn the decision then the state was in error on either procedural or substantive grounds. When this occurs it is because states have not appropriately trained and monitored hearing officers or the policies and procedures of the state are not being implemented consistent with the requirements of P.L. 94-142. If states were doing a better job in this area of responsibility then better decisions would be made more expeditiously, the need for litigation would be reduced, and less stress would be placed on the judicial system and the parties involved. It is essential, we believe, that this issue be addressed. At the same time we believe the courts should assess fees against the education agency whose decision is being reversed. For example:

1. If the parents win a local hearing and the state education agency (SEA) reverses the decision on appeal, the SEA should be responsible for attorney fees if the court finds in favor of the parents.

2. If the parents win or lose a local hearing, and the SEA finds in favor of the parents on appeal, the local education agency (LEA) should be responsible for attorney fees if it appeals the decision and if the court finds in favor of the parents.

3. If the parents lose both the LEA hearing and the SEA appeal, the SEA should be responsible for attorney fees if the court finds in favor of the parents.

Placing fiscal accountability on the responsible parties, should encourage more appropriate behavior on their part.

Secondly, while the process system is the appropriate means for resolving disputes some issues arise that can be resolved through other avenues if the parties involved know they exist and operate in an efficient and effective manner. An example is the complaint procedure which exists under the Education Department's General Administrative Regulations (EDGAR). Under this procedure an individual or organization who believes that the requirements of P.L. 94-142, or any other education law, are not being carried out can complain to the state, who is then obligated to investigate and resolve the complaint. For a number of issues the EDGAR complaint procedure could be a more effective vehicle for resolving conflict than the process procedure under P.L. 94-142. For example, a parent discovers that while his or her child's I.E.P. specifies that physical therapy will be provided the school has refused to actually provide it. This is an obvious violation of the law. The parent has the right to complain to the state, who should be then obligated to require the school district to carryout the I.E.P. and provide the physical therapy. In this example, this is a much simpler and efficient approach for the parent. This alternative, however, is rarely utilized for the following reasons.

The public is generally unaware that it exists because it is not found in the P.L. 94-142 regulation descriptive material or training activities.

2. The Office of Special Education has generally not provided guidance to SEAs in this regard nor emphasized it in their monitoring.

3. States presently generally do not have this procedure effectively operative.

We urge the subcommittee to require the Department of Education to develop further criteria for implementing the EDGAR complaint procedures as they pertain to Part B of the EHA, provide technical assistance to SEAs in implementing such requirements, monitor SEA implementation, and to require that parents and professionals be informed about the availability of this procedure and the means of utilizing it.

We appreciate the opportunity to present our views to the subcommittee on this most important issue and we stand ready to work with you in this regard.

REPORT OF THE COUNCIL FOR EXCEPTIONAL CHILDREN'S TASK FORCE ON SMITH VERSUS ROBINSON—A REPORT TO THE CEC GOVERNMENTAL RELATIONS COMMITTEE, JANUARY 8, 1985

CEC TASK FORCE ON SMITH VERSUS ROBINSON

Philip Jones, Chair, Professor and Coordinator, Administration of Special Education, Virginia Tech.

Harold Burke, Director of Special Education, Alexandria, Virginia Public Schools.

Margaret Burley,[1] Executive Director, Ohio Coalition for the Education of Handicapped Children.

Stephen Conley, Director, Richmond, Virginia Cerebral Palsey Center.

Carl Haltom, Delaware State Director, Division of Exceptional Children/Special Programs.

Carol Johnson, Supervising Director of Assessment and Placement, District of Columbia Public Schools.

Rebecca Marti, Special Education Teacher, Fairfax County, Virginia Public Schools.

Thomas O'Toole, Director of Special Education and Related Services, Montgomery County, Maryland Public Schools.

In early November, 1984, the Council for Exceptional Children's (CEC) Governmental Relations Committee appointed a Task Force to study the issues resulting from the Supreme Court's decision in *Smith* v. *Robinson* and recommend to the Committee any legislative response necessary. The Task Force met on November 26, and December 19, at CEC Headquarters. The primary task during the first meeting was to identify the issues resulting from the Supreme Court's decision and develop a discussion paper around the issues. At the first meeting, the Task Force members agreed that input from concerned groups was necessary to assure that the Task Force considered both sides of the potential issues.

Following the first meeting, the discussion paper was circulated to several concerned organizations and individuals as well as the CEC Division PAN Coordinators. Representatives of four national organizations and one individual were invited to react to the discussion paper and interact with the Task Force on December 19. Invited to address the Task Force on December 19 were representatives of the following organizations: American Association of School Administrators, Association for Retarded Citizens, National School Boards Association, and United Cerebral Palsy Associations, Inc. Also invited to speak was Martin Gerry, Washington based attorney and former director of the U.S. Office of Civil Rights. Also in attendance at the December 19 meeting were representatives of the American Speech, Hearing, and Language Association, National Society for Autistic Children and Adults, and the National Education Association. Brief comments were heard from these three groups and following the presentations the Task Force developed the policy recommendations contained in this report.

BRIEF SUMMARY OF THE PROBLEM

In July, 1984, the United States Supreme Court ruled in *Smith* v. *Robinson* that when an individual's rights are covered under P.L. 94-142 they have no protections or legal course of action under Section 504 of the Vocational Rehabilitation Act of 1973, or other civil rights statutes. The rationale of the Court was that P.L. 94-142 was passed after Section 504 and is more detailed and specific; thus, the Congress must have intended for it to be the prevailing policy. While there is just cause to question the Court's logic and interpretation of Congressional intent, the decision stands unless Congress acts.

There are many obvious and speculative implications of the decision. Perhaps the most immediate one relates to court awarded attorneys' fees. Under P.L. 94-142 there is no legal authorization for the courts to award parents who prevail in court any reimbursement for the costs they incurred in pursuing their actions through the courts. Historically, parents going to court sued under P.L. 94-142 and Section 504. Since attorneys' fees were reimbursable under Section 504, the court could choose to order such payment if the parent prevailed. Since *Smith* v *Robinson* eliminated Section 504 as a course of action, there is no authority for the courts to award the payment of court costs. Many believe that this will severely constrain parents' ability to exercise their rights under P.L. 94-142. Second, since P.L. 94-142 and Section 504 were designed to work in tandem, it is believed that the loss of Section 504 and other civil rights statutes as a course of remedy will severely limit the ability to enforce the educational rights of handicapped children. For example, since P.L. 94-142 places primary enforcement in the hands of the state and monitoring of the states in the hands of the federal government, the only base of federal appeal has been to the Office of Civil Rights (OCR). With loss of the applicability of Section 504, it is possible that OCR may determine that it has no authority to be involved in education of the handicapped issues.

[1] Joe Reed, attorney from Columbus, OH represented Margaret Burley during the meetings and deliberations of the task force.

In July, the House of Representatives and the Senate introduced companion legislation, H.R. 6014 and S. 3859, under the title "The Handicapped Children's Protection Act of 1984." The proposed legislation would have done two major things: First, Section 2 of the bills would have amended P.L. 94-142 to authorize the courts to award attorneys' fees when parents or their representatives prevail in court. Second, Section 3 of the bills would have clarified that when an individual is protected by P.L. 94-142, they are still protected by Section 504 and other civil rights statutes. Because the legislation was introduced in the closing days of the 98th Congress, no time was available for hearings to be held on the proposed legislation, or for interest groups to carefully examine the bills' implications. Most handicapped advocacy groups supported the legislation as written and some education groups opposed it. CEC supported Section 3, noting that it would correct *Smith* v *Robinson* and return policy to the status quo. CEC opposed Section 2, arguing that it expanded policy beyond what existed before *Smith* v *Robinson* and that this should not be done without the opportunity to examine the impact, nor without the opportunity for public input. While compromises were attempted, they could not be reached and the proposed legislation did not pass before the Congress adjourned. It is expected that legislation will be introduced in some form and considered when the Congress returns.

DELIBERATIONS

At its first meeting on November 26, 1984, the Task Force discussed many of the potential implications of the *Smith* v *Robinson* decision as well as fundamental problems concerning the ability of parents, schools, and professionals to effectively exercise their rights and responsibilities under P.L. 94-142. The Task Force agreed that the following principles should guide further Task Force Discussions:

1. Federal policy should assure that there is an effective balance between the rights and responsibilities of parents and those of the schools.
2. Federal and state policy, including fiscal, should encourage the resolution of disagreements between parties in the shortest period of time and in the most cost effective manner for all parties concerned.
3. The rights of individual professionals must also be considered in a manner equal to the rights of parents and the schools.
4. While utilization of the courts and participation of the legal community is an essential right possessed by all parties, policy is an essential right possessed by all parties, policy should not encourage or weigh in favor of legal resources as opposed to other forms of dispute settlement.

The Task Force also raised a number of questions to consider with invited speakers on December 19, 1984.

1. Is maintaining a relationship between Section 504, of the Vocational Rehabilitation Act of 1973, and other civil rights statutes to P.L. 94-142 essential to assuring a balance between the rights and responsibilities of parents and those of the schools?
2. Are awards of attorneys' fees essential to the balance? If the answer is yes:
   a. Should fees be awarded at a lower level of the process than court to expedite conflict resolution?
   b. Since states are responsible for the integrity and quality of the procedural safeguards system, should states be responsible for assuming the fiscal liability of attorney fees?
   c. Should federal funds be available for use by SEAs or LEAs to meet the costs of attorneys' fees?
   d. Should professionals who are sued individually as part of an action against a school system or state and who have to assume the cost of their legal representation be awarded attorneys' fees if they prevail in court? If so, who should pay?
3. Is the right of a parent to bring a complaint to the federal government essential to the balance? If the answer is yes, should that complaint go to the Office of Civil Rights, the Office of Special Education Programs, or some other agency?
4. Should, and if so how can, the procedure under the Education Department General Administrative Regulations (EDGAR) of complaint to the State Education Agency be utilized to resolve procedural issue disputes? What other alternatives are there that could be utilized to resolve procedural issues?
5. Are there alternatives to due process hearings and litigation for resolving disputes over substantive issues in a more efficient and effective, as well as equally fair, manner? If so how can they be encouraged?

6. As an alternative to awarding or reimbursing for attorneys' fees, should government at some level make available free legal assistance to parents who require it at any level of the process?

7. Do parents adequately understand their rights and responsibilities under P.L. 94-142? If not, what should be done to improve this situation?

The Task Force also collected and reviewed data regarding court decisions and due process hearings in an attempt to develop a better understanding of the scope of the potential problems created by the Court's decision. For the period July 1, 1983–June 30, 1984, the Education of the Handicapped Law Report reveals that decisions were reached in 81 cases before state and federal courts. Data from 14 reporting states reveals great variability in the number of hearings held during 1983–84. The range was from 0 to 49 with only three states reporting more than 12 hearings. The majority of the hearings reported involved the issue to private school placement.

FINDINGS

The Task Force supports the initial position CEC took on the corrective legislation introduced late in the second session of the 98th Congress. The need for full discussion and study of the implications of H.R. 6014 and S. 3859 was not possible late in the session. Time did not allow for hearings on the proposed legislation. Since it appears similar legislation will be introduced in the 99th Congress, the process of creation of the Task Force was not only appropriate, but the Governmental Relations Committee and CEC staff are commended for initiating this activity. It is our belief that hearings and opportunities for public input should be provided by the Congress when considering significant policy matters. The Task Force believes that the recommendations below will provide the necessary safeguards and accountability factors not present in the bills introduced in the 98th Session.

RECOMMENDATIONS FOR POLICY AND ACTION

I. The Council for Exceptional Children strongly supports the resolution of disputes at the lowest possible level in the minimum amount of time to assure that the education of a handicapped child does not suffer during the process of dispute settlement.

A. To assure timely settlement of disputes, the SEA should develop a system to assure that competent advice is available to the parents and the LEA at the lowest possible level in dispute settlement.

B. The LEAs and SEAs should develop systems and procedures which may serve as alternatives to due process hearings and litigation with the assurance that the rights of handicapped children and their parents are not compromised in an attempt to obtain a timely and fair resolution to disputes over substantive issues. The utilization of mediation, negotiation, and ombudsman models are encouraged when both parties agree to the utilization of such practices. Such practices should become the subject of ongoing study by SEAs and other parties interested in procedures for dispute resolution.

II. The Council for Exceptional Children supports the continuation of a federal complaint procedure as currently exists within OCR where a violation of the rights of a handicapped child appears evident.

III. The Council for Exceptional Children supports the award of attorney's fees under P.L. 94-142 at the discretion of the court based on such factors as ability to pay and the substance of the issues involved. Such a procedure, with the qualifications below, is seen as essential to balancing rights between the schools and parents.

A. Such awards should be assessed against the education agency which made a decision that is subsequently reversed in litigation. Examples:

1. If the parents win a local hearing and the state education agency (SEA) reverses the decision on appeal, the SEA should be responsible for attorney fees if the court finds in favor of the parents.

2. If the parents win or lose in LEA hearing, and the SEA finds in favor of the parents on appeal, the LEA should be responsible for attorney fees if it appeals the decision and if the court finds in favor of the parents.

3. If the parents lose both the LEA hearing and the SEA appeal, the SEA should be responsible for attorney fees if the court finds in favor of the parents.

B. Attorneys' fee awards should not be paid from federal program funds (Part B, EHA), except that consideration should be given to permitting the use of P.L. 94-142 SEA administrative funds for this purpose.

IV. The Council for Exceptional Children supports the authority and responsibility of the SEA in administration and supervision of programs for handicapped children. The Council supports the strengthening and streamlining of SEA complaint

procedures under EDGAR or other avenues and strongly encourages SEAs to make parents aware of these avenues for complaints. Where policy issues are the focal point of a complaint, the SEA should clarify policy and disseminate the clarification to all LEAs and interested groups. The Council supports the efforts of the Office of Special Education Programs, U.S. Department of Education, in strengthening the state monitoring system and encourages SEAs to strengthen monitoring systems within states.

V. The Council for Exceptional Children supports increased efforts on the part of LEAs, SEAs, and all appropriate governmental and voluntary agencies and organizations to inform staff and parents of their rights and responsibilities for the education of handicapped children.

OTHER CONSIDERATIONS

While not directly related to the issues arising from the *Smith* v. *Robinson* decision, the Task Force expresses concern in two areas. We are concerned that many parents are unable to exercise their rights under the procedural safeguard system of P.L. 94-142 because they lack the knowledge, skills, and financial resources necessary to function effectively in the system. The awarding of attorneys' fees, while important, does not provide the support that parents who do not have the resources, fiscal and otherwise, need to even enter the process. Study needs to be given to better support systems for these parents.

Task Force members also became aware of litigation where individual employees were named as defendants in addition to the employing agency. In such cases, the individual employee may incur costs of legal defense to protect their interests. The Task Force recommends that in cases where an individual employee is acting under the direction of the employer and providing programs or services for handicapped children based on accepted professional standards of practice that public funds be utilized in the defense of the employee. The Task Force further recommends that this problem become the subject of further study by CEC and other professional organizations.

Mr. WILLIAMS. Thank you, Mr. Weintraub.

Mr. Bartlett.

Mr. BARTLETT. Thank you, Mr. Chairman.

Ms. Arnold, let me begin with your testimony just to make sure. I believe your testimony was quite good and quite complete, but let me make sure that I understand. You are suggesting a need to clarify what you view as the technical ambiguity so that only court-related or litigation-related fees would be reimbursed. As you know, that is the intent of the sponsors of the bill, and you are going to suggest to us some language that could—you are contending there is an ambiguity and it may or may—the drafting we have may or may not do that.

Ms. ARNOLD. Yes, sir.

Mr. BARTLETT. Under what circumstances would the draft that we have not—or allow more than just court-related costs?

Ms. ARNOLD. It doesn't limit the award to merely judicial——

Mr. BARTLETT. So it is not an expressed limitation?

Ms. ARNOLD. Right, which is needed.

Mr. BARTLETT. And you would also have us, then, expressly prohibit the bypass of 94-142 procedures or administrative due process directly to Federal courts, so you would also have us expressly prohibit the bypass of 94-142 to Federal court. Is that your testimony?

Ms. ARNOLD. Yes, sir.

Mr. BARTLETT. OK, and you provide some suggested ways of doing that for us, also. One other question, and that is, how would you build in——

Ms. ARNOLD. Unless it is—excuse me—unless it is a situation in which 94-142 would not apply, would not provide the remedy.

Mr. BARTLETT. So in those cases in which 94-142 is applicable, you would prohibit the bypass of the due process——

Ms. ARNOLD. That is correct.

Mr. BARTLETT [continuing]. Procedures.

Would you support or oppose any sort of a cap on attorney's fees, either an hourly rate or some sort of a—perhaps there is a way to have this committee define—that the attorney would have to prove up what his rate is or something like that. Do you see that as a problem?

Ms. ARNOLD. I think that would be very difficult for the committee to deal with. The marketplace criteria, I think, is a fairly workable one. The marketplace tends to reflect what the—or the attorney's fee award under the marketplace criteria would reflect what the regional market can bear. As you know, attorney's fees vary widely from place to place.

For instance, my fees in Texas, in Houston, were about three times higher than they are now in Blacksburg, VA.

Mr. BARTLETT. Would you have the Congress give the courts any guidance at all as to how to set the attorney's fees or are you satisfied that courts are now setting them adequately?

Ms. ARNOLD. I think that the courts have developed a number of standards that are used that would work quite well with litigation under 94-142 in determining the attorney's fees awards.

Mr. BARTLETT. Mr. Weintraub, I wondered if you could elaborate a bit. You suggested in broad terms that we should restore the relationship between 94-142 and 504. Could you elaborate as to what in this bill should be done? Does this bill do that or is there something else that needs to be done to restore that relationship?

Mr. WEINTRAUB. I think the bill generally does that, and we support that. Fundamentally, that was what the Supreme Court undid in *Smith* v. *Robinson*. What the Court said was that since 94-142 existed, the parallel legislation, section 504, was therefore nonapplicable. I think in designing 94-142, the Congress intended the two to work together.

Certainly, as this committee knows, last year in its efforts in looking at monitoring, there was concern about the degree to which the Office of Civil Rights and the Office of Special Education was effectively working together and the question of whether the memorandum of agreement that used to exist——

Mr. BARTLETT. So you think this bill accomplishes that?

Mr. WEINTRAUB. I think this bill restores that relationship. I do think and agree with Ms. Arnold that somewhere we have got to also look at how the two function together, but I think the principle of restoring the relationship is addressed and we support that.

Mr. BARTLETT. Would you include, as we have done in this bill, some sort of mediation component or a right for that informal hearing before the due process begins, the right to the parent?

Mr. WEINTRAUB. We have some concern about the way the language is addressed or the language is set forth in the bill. We support the need for continual efforts at informal resolution. We have to look and make sure that in doing that, we don't delay the process and, in fact, protract it. The legislation presently permits mediation. I think part of the issues and part of some of the concerns that Mr. Wright addressed are really issues that we ought to be ad-

dressing to the State of Texas, or addressing to some of the States as to why they have not utilized that authority for effective mediation and put that into place.

I am not sure that we need to require it. Once people have reached the point of saying, "Let's go to a hearing because we disagree," I am not sure forcing them into informal negotiation after the negotiation should have already taken place, but I do support the principle that you are trying to address. I am concerned about some of the language.

Mr. BARTLETT. Thank you, Mr. Weintraub.

Mr. WILLIAMS. Mr. Martinez.

Mr. MARTINEZ. No questions.

Mr. WILLIAMS. Ms. Arnold, let me see if I understand your testimony.

The Department of Education has issued regulations implementing 94-142 and section 504. In certain respects, these regulations overlap. Now, the fact that BEH, which is now Special Education Programs, and OCR have shared responsibility regarding the rights of handicapped children represents—quoting now from your testimony—"poor management of Department resources in times demanding the utmost fiscal responsibilities."

Your solution, as I understand it, is to restrict OCR's jurisdiction and, you have a point, perhaps only one office within the Department of Education should be responsible for ensuring compliance with the various congressional mandates affecting the handicapped. But let me ask you: Shouldn't that office be OCR instead of SEP in light of OCR's long history and experience with enforcement and compliance?

Ms. ARNOLD. We are not overly concerned as to which office monitors the compliance, as long as it is monitored consistently and as long as the procedural requirements set forth in the regulations are mandated.

Mr. WILLIAMS. Let me be sure on one other point that I understand correctly your testimony and your answers to Congressman Bartlett, do you want the legislation to specify that fees for mediation are not to be awarded?

Ms. ARNOLD. I am not sure that is the language I would use, but——

Mr. WILLIAMS. Let me have your language; you tell me what you want, then.

Ms. ARNOLD. I would rather have some time to work with your staff on that, but what we would like is a limitation that the award of attorney's fees would be for judicial proceedings, for time and effort spent——

Mr. WILLIAMS. Litigation rather than——

Ms. ARNOLD. Than the due process hearing procedures. Primarily because we feel that that would drastically alter the nature of the due process hearing itself.

Mr. WILLIAMS. We look forward to working with you on that.

Mr. Weintraub, in your testimony, you described the importance of the selection and training of hearing officers. Would you expand on that somewhat and tell us how it might relate to reducing the numbers of cases that might go to litigation?

Mr. WEINTRAUB. I think that we have to remember that there are generally two types of issues that come up in the hearing process. Again, we are emphasizing—as you indicated, there were only, what, 1,400 hearings—but the issues are generally over what is appropriate for the child. It is an educational decision. We are trying to decide what is the free appropriate public education for that child. The majority of the hearings deal with placement, deal with related services, issues like that.

The second type of issue that comes up in a hearing relates to policy. An example was the *Tatro* case in Texas, which dealt with; is catheterization required or isn't it required. There wasn't really much debate as to whether Andrew Tatro needed catheterization or not; the question was, was the school required to provide it or not. Those are generally the two types of issues that come up in a hearing.

To do that, a hearing officer must, I think, be well trained in, one, the requirements, the law and how the process can effectively work and how to keep the process on task; and two, is to know what the policies of the State are and to know how to interpret those within the light of the decisions that are being made.

In many cases, hearing officers are selected in some States simply because—in some States, they are selected because they are lawyers, under the assumption that even lawyers are a good idea in this. I don't know why lawyers in some cases are selected to be hearing officers. In other cases, lawyers are simply selected on the basis that they have had a lot of experience with handicapped kids, not necessarily that they are effectively trained, that, too, that their decisions are monitored not by the State agrees or disagrees with the decision, but that, in fact, the decisions are of the kind of quality that need to be done.

If that was done, then I think there would be less propensity and need to go to court. I think we also have to keep in mind that the court, in the *Rowley* decision, basically said that if the process is carried out with good integrity, then the courts are not going to step in and make the kinds of decisions that Superintendent Wright suggested that they are going to make, that the courts are going to make educational decisions. The courts have said, "We don't want to do that."

Where does the court get involved? The court gets involved when the integrity of the system is not carried out in the way it should be. I think the only way you can hold the integrity accountable is to place the financial responsibility on the backs of those who make the decisions.

Mr. WILLIAMS. Thank you very much.

We appreciate the testimony of both of you and, again, of Mr. Wright. Thank you.

Mr. WEINTRAUB. Thank you.

Mr. WILLIAMS. We will call our second panel. Ms. Roberts and Ms. Galarza.

We also welcome to the committee the gentleman from New York, Mr. Biaggi; the gentleman from Texas, Mr. Loeffler, and I understand, Mr. Loeffler, that you wish to introduce one of these witnesses to the committee.

Mr. LOEFFLER. I do, Mr. Chairman, and I thank you for the opportunity to play a small role in your hearings today.

It is my high honor and great privilege to be able to introduce before you and the members of this subcommittee one of my constituents, Ms. Beverly Galarza, from San Antonio, TX. Beverly has worked diligently to effect changes in the law with respect to the recovery of attorney fees for the prevailing party under the Education of All Handicapped Children's Act.

Mr. Chairman, and members of the committee, from time to time, we travel hard throughout our congressional districts; we return to Washington; we listen to all of the expert witnesses who have been studying issues year in and year out and sometimes we wonder why it is important for us to return home. Beverly is a case in point that makes all Members of Congress feel that, in fact, it is most important to be able to touch and to visit with those who you represent and to do that on a one-to-one basis.

We met in the latter part of last year and I was as impressed with Beverly's determination as I was with her own personal experience as a parent. These experiences are those that she will share with you, Mr. Chairman, and members of the subcommittee today.

To you, Mr. Chairman, and to the members and the staff of the subcommittee, I particularly want to thank you for working with Beverly. Particularly do I want to express my appreciation and thanks to my colleague from Texas, Congressman Bartlett, as well as his very capable staff who have joined me, my staff and Beverly in making this presentation to you today. To all of you on the committee and to those of you in the audience today, when you hear her speak, you will know that she speaks from the experience to avoid.

Mr. Chairman and members of the committee, I will do everything in my power to work with you to see that the problems that she has confronted as a parent on behalf of her child and all handicapped who have to suffer the same experience never recur again.

Thank you, Mr. Chairman, and members of the committee.

Mr. WILLIAMS. Thank you, Mr. Loeffler, we appreciate that introduction and particularly appreciate your interest and good guidance in this important issue.

Ms. Galarza, we will start with you.

STATEMENT OF BEVERLY J. GALARZA, SAN ANTONIO, TX

Ms. GALARZA. Mr. Chairman, and members of the committee, I am Beverly Galarza of San Antonio, TX. I am here today to testify before this committee to tell all of you about my 5-year legal battle to secure the guarantees of the Education of All Handicapped Children's Act for my son, Steven, about the fact that it is impossible for myself or any parent to pursue the act's guarantees without legal representation and why the act must be amended to ensure that it is not flagrantly ignored by our school districts.

I am a single parent and have always had to work full-time hours a week to support myself and my child. My only son, Steven, is severely handicapped due to being developmentally delayed as the result of his cerebral cortex not developing properly. Steven is 12 years old. Although he has no verbal language, Steven commu-

nicates through the use of a notebook-type binder which contains approximately 13 pages of picture/word combinations and words without pictures. He is learning to make very short sentences by stringing three to six words together. Four years ago, when Steven was 8 years old, Steven had no means of communication except to laugh, cry, and tantrum. Since the spring of 1982, Steven's physical development has progressed from learning to crawl on his hands and knees to sidestepping the length of a table, then to walking with a walker. He can now walk holding my hand and just a few months ago, he began taking some independent steps.

Steven is incontinent and we have been unsuccessful in our attempts to toilet train him. Without our continued structured and repetitive program, Steven is subject to behavioral outbursts and regression.

During Steven's preschool years from age 3 to 5, his progress was slow but steady thanks to a 12-month education provided through the Head Start Program. An example of the benefits of a 12-month program was that at age 5 when he left the program, he could stand and hold on to a little walker and move it a couple of steps. However, when he entered public school, he was only provided 9 months of school with no provision for the summer months.

As a consequence, after he left the 12-month Head Start Program, all of the learning Steven achieved from September to May was lost during each summer. For example, he was not able to walk with the aid of the walker again until he was 10 years old.

In September 1980, I asked my son's school to provide a 12-month school program for Steven. When officials refused, I obtained legal representation and we pursued the State administrative avenues provided by that act. It was not until 9 months later, just as school was ending in May, that our case was heard by a State hearing officer.

Evidence was presented during a 2-day trial. Both the school and I were represented by legal counsel. Although the decision was not rendered until the end of 1981, more than 1 year after I had requested summer schooling, the ruling was favorable to Steven. We had achieved what I had contended from the beginning was due my son under Federal law.

Our success, however, was short lived. In February 1982, the school district filed suit in Federal district court seeking review of the State education agency's ruling; 2 years later, I was once again awarded the relief I requested in 1980. However, in the process of defending the State's ruling and this relief, my attorneys expended numerous hours briefing issues which the judge himself characterized as numerous and complex.

During the course of litigation, my lawyers were successful in getting a preliminary injunction requiring the school to give my son summer school for the summer of 1983. However, this was only after the court heard 5 days of evidence, mostly from experts, and required legal briefing on numerous procedural and substantive issues.

In early summer of 1984, the Federal court upheld the State's decision, and after finding that I was the prevailing party, found that I should be awarded my attorney's fees. However, before the court was able to determine the amount of such an award and enter an

order, the Supreme Court decided in *Smith* v. *Robinson* that because Congress did not expressly state that fees were available to parties who prevailed in litigation under the EAHCA, none could be granted.

Because of this decision, my attorneys were not awarded their fees by the Federal court. Unfortunately, but predictably, the school district has appealed the district court's order affirming the State agency's decision requiring summer school to be provided. Regardless of the appeal, I anticipate further legal battles prior to every summer session.

I am here today because I am concerned not only for what lies ahead in my case, but for those parents yet to come who may be faced with problems that cannot be resolved between the parents and school officials. I am convinced that without the act being amended to include a reasonable award of attorney's fees to prevailing parties in any action dealing with the EAHCA, parents will be unable to challenge their school district's decisions and the act will become an empty promise to the handicapped children of America.

Although a parent knows their child's individual needs, their knowledge and compassion do little good in the legal proceedings built into the EAHCA when the school district attempts to escape its responsibility to educate a handicapped child.

We are not equipped with law degrees or the experience that comes with being a lawyer. We are ignorant regarding procedural rules. We are no help to the courts in researching or interpreting and applying the law to the difficult questions posed by our cases. The courts rely heavily on lawyers to brief cases and legal issues, a task which a parent would be helpless to perform.

Also, at the administrative level, which is mandatory and critical, the school district will always be represented by counsel. Issues are complex and evidence no less important than before a court. Without an attorney, parents have little chance of prevailing, despite the merits of their case. I cannot conceive of a parent attempting to bring a case before a State agency or Federal court alone.

The injustice faced by parents without attorneys is especially severe in a case like mine where the parent prevails at the administrative level. I was satisfied with the decision of the State education agency. I did not file a lawsuit in Federal court; the school did. They have not stopped appealing and they won't. There is no incentive for them not to.

I would ask you to think about the stubbornness of this school district in Texas and about the children who one day may have their rights under the law violated. Each of you should consider whether attorneys in your districts would be willing or able to become involved in a long, complex, and emotional case, knowing that even if they prevail, that they would not be paid for many hours and years of labor.

In my particular case, my attorneys have spent over 700 hours from the fall of 1980 to the present.

These concerns are clearly spelled out in a letter which I would like to submit to all of you as part of my testimony that my attorney wrote to Congressman Bartlett at his request. The letter dis-

cusses the amount of hours spent by my lawyer, both at the administrative level and in district court, as well as some of his own concerns involving the act.

[The letter from Henry W. Christopher, Jr. follows:]

JOHNSON & CHRISTOPHER,
San Antonio, TX., February 4, 1985.

Hon. STEVE BARTLETT,
U.S. Congressman,
Longworth Building, Washington, DC.

DEAR CONGRESSMAN BARTLETT: You will recall that in November of 1984, my client, Beverly Galarza, and I met with you to discuss our concerns about the impact that the United States Supreme Court's Decision in *Smith* v. *Robinson* will have on the ability of a parent to enforce the rights of a parent and handicapped child under the Education of All Handicapped Children Act ("EAHCA"). Mrs. Galarza and I appreciate very much the time that you set aside to allow us to explain our concerns to you.

At the time of our meeting, you requested me to provide you with certain information. Please accept my apology for the delay in responding.

We did some research to try to isolate the number of cases that had been litigated and taken up on appeal since the enactment of the EAHCA in 1975. I enclose a Schedule of Citations reflecting those cases which have reached the appellate level as of approximately the end of 1984 and which involved an effort by a parent and/or handicapped child to exercise rights granted under the EAHCA. As you will note, there have been approximately 115 cases that reached the appellate level in the nine years that the EAHCA has been in existence, or approximately 13 cases per year. There have been, of course, other cases under the EAHCA which dealt with disputes between the various governmental agencies with regard to funding and other technical disputes. The Schedule of Citations include only those cases that appear to have involved disputes between the parent-child and the School District.

You further requested information with regard to the procedures applicable to Mrs. Galarza's efforts to pursue the rights and remedies provided by the EAHCA. I enclose a copy of the response that was received from the Texas Education Agency after Mrs. Galarza invoked her rights of appeal following the unfavorable action of the Admissions, Review, and Dismissal Committee ("ARD Committee"). I further enclose Disclosures of Evidence and Witness and Document Lists exchanged between the attorneys as required by Federal Regulations governing the EAHCA. Mrs. Galarza's exercise of her administrative remedy resulted in a two-day trial before a Hearing Examiner, at which ten witnesses presented testimony, primarily individuals having expertise in various disciplines. The witnesses included three psychologists, two teachers, a Director of Special Education, and a pediatrician/neurologist. A total of 124½ hours had been expended by our firm, primarily by me, prior to the time the School District filed its Petition in U.S. District Court exercising its right to appeal the Administrative Order, which granted the relief requested by Mrs. Galarza.

The Administrative Hearing was concluded in May of 1981, the Administrative Order was issued in January of 1982, and the appeal by the School District was commenced in February of 1982. Injunctive relief to implement the Administrative Order, at least in part, was obtained and remained in effect at the time of the trial before a U.S. Magistrate in May of 1983. That trial took one week to complete and included testimony by 18 witnesses, who again were primarily persons with expertise in various disciplines. They included an orthopaedic surgeon, two physical therapists, two speech therapists, two occupational therapists, one doctor of education, one doctor of special education, one pediatrician/neurologist, a psychologist, a principle of a state school for handicapped children, and two teachers. As of July, 1984, our firm had expended approximately 185 additional hours (a total of 310 hours), and an attorney who has worked as co-counsel had spent approximately 400 hours. At that point, the trial, including all proceedings before the United States District Judge, had been completed. The case is now on appeal to the Fifth Circuit.

As I stated at the time of our meeting, a parent is ill equipped to represent herself and her child in exercising her administrative remedy under the EAHCA. Generally, the parent will have no knowledge of procedural and evidence requirements, nor the ability to secure and organize the evidence to present the facts to the Hearing Examiner. Unless there is a full and proper presentation of the facts, the issues cannot be fairly resolved. Furthermore, it is unlikely that a parent can look at the issue objectively. It would be a rare parent who could withstand the pressures of the

"system" at the same time that parent is enduring all of the emotional upset that exists in caring for a handicapped child and is being frustrated in that parent's efforts to obtain the educational aid that is believed to be required by the child.

The Administrative Hearing is extremely important, because under the EAHCA it creates a record for review by the Judge who hears any appeal of the Administrative Order and who will be expected to put substantial weight on the facts elicited at that Hearing. A failure to properly present the facts and applicable law at the administrative level may well result in an inadequate record, and a losing parent would thereby be effectively denied an appeal. It is simply unfair to expect a parent to handle the case for a parent-child against experienced school officials and witnesses. The inequity is further increased when the School District elects to spend public monies to hire an attorney to represent it in the proceeding.

There is no question that a parent will be unable to cope with the procedural and evidentiary requirements incidental to an appeal of an Administrative Order to the judicial level. Without representation, a parent losing at the administrative level is, again, effectively denied the ability to utilize the remedies purportedly granted by the EAHCA. The inequity of the denial of an effective right of appeal is even more glaring when you consider a case where the School District has lost at the administrative level. If the parent cannot be represented, all the School District has to do is appeal, and the Order of the Administrative Hearing Examiner will never be implemented.

It is unfortunate that the issues involving the education of a handicapped child are as complex as they are, but a review of the cases that have reached the appellate courts will reflect that this is generally true.

We talked about your concerns about the possibility that a parent who did not in fact "win", might nevertheless be allowed a recovery of attorneys' fees. I have thought considerably about your concerns, but have not been able to come up with any better solution than to permit a recovery of attorneys' fees to be awarded to a parent-child who "prevails". I realize that it is possible to have a difference of opinion as to whether or not a parent "prevailed" in an individual case, but I know of no better solution that to permit the Judge who has heard the facts to make that decision. A review of the cases will reflect that the courts generally require that the parent must have prevailed in a "substantial way". Furthermore, the courts generally carefully scrutinize the time spent by the attorney to be sure that attorneys' fees are awarded only for that time reasonably and necessarily expended on those issues upon which the plaintiff prevailed in a substantial way.

The fact that the number of cases filed over nine years (not including those still at the trial court level, or which never reached an appeal) totaled only approximately 13 per year, leads me to believe that there will not be a substantial influx of cases simply because a prevailing parent/child is entitled to recover attorneys' fees. Only those parents who feel very strongly about the needs of the child will be willing to expend the time and bear the emotional stress necessary to exercise the rights granted by the EAHCA. I believe that while there may be some unreasonable parents, in most instances, there will be a substantial basis in fact for the relief requested. Having experienced a proceeding under the EAHCA, I am convinced that if the EAHCA is not amended so as to provide reasonable access to adequate representation by an attorney, the EAHCA might as well be repealed and the Decisions left exclusively in the hands of the School District, who, after all, control the ARD Committee. Alternatively, if the Act is to be maintained and is to be enforced, it would be necessary to establish some procedure for representation through a federal or state agency, which would be far more costly and less efficient than permitting a prevailing parent a recovery of attorneys' fees incurred.

There is one other point that I believe is significant in responding to the argument that permitting a parent to recover attorneys' fees will cause a great deal of additional and perhaps unnecessary litigation and, therefore, expense to be incurred by School Districts. It should be remembered that even in those instances where an attorney is compensated, he is compensated only at a reasonable hourly rate for services rendered, and only with regard to time spent on those issues upon which the parent prevailed in a substantial way. Generally, then, even when a parent wins, the attorney is not likely to receive a full normal hourly rate for time expended in the case. In those cases where a loss occurs, no fee will be payable. Generally, an attorney is unwilling to take contingent fee cases, unless there is a reasonable expectation of a higher recovery than a normal hourly rate if the case is won. The reason for that is that the contingent fee cases that are lost must be offset by earnings in other cases. It is extremely unlikely that there will be many attorneys, and certainly no competent and ethical ones, who will be willing to devote time to a case unless there is some merit in the case. His rewards, if he wins, are less than he

would obtain from pursuing normal employment that is not as stressful as participating in a case involving the rights of a handicapped child, and he further will subject himself to no compensation if a loss occurs. Finally, I believe that it had been generally believed in the educational community, up until the time of the Decision in *Smith* v. *Robinson*, that attorneys' fees were recoverable by prevailing parents. There have been a number of cases that have so held. Despite that prevailing belief, there has not been any substantial influx of litigation.

You will recall that in response to your question at the time of our meeting I advised that I would be available to provide testimony before any appropriate Committees of Congress, if requested to do so. I also have secured the name of an attorney in the Dallas-Ft. Worth area who may be able to provide information to you on this issue, although I have not talked to him. He is the Honrable Craig Enoch, who, I believe, is now a State District Judge. It is my understanding he handled a case under the EAHCA during his years of private practice.

Again, I wish to express my appreciation and that of my client for your willingness to consider our views on this important issue.

With best regards, I am

Yours very truly,

HENRY W. CHRISTOPHER, Jr.

Enclosures.

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TEXAS EDUCATION AGENCY,
Austin, TX, May 14, 1981.

Re Steven G. bnf Mrs. Beverly G. v. Alamo Heights Independent School District—Docket No. 148-SE-581.

WILLIS W. LUTTRELL, Jr.,
Johnson & Christopher,
San Antonio, TX.

CALVIN E. GROSS,
Superintendent, Alamo Heights Independent School District,
San Antonio, TX.

GENTLEMEN: This will acknowledge receipt of the request for hearing in the above-styled and numbered matter. For Respondent's information, a copy of the request is enclosed. Also enclosed is a copy of this Agency's procedures for hearings concerning handicapped student.

Mr. James P. Williams has been appointed hearing officer in this matter. He will contact the parties with additional information pertinent to the request. Please be advised that although the hearing officer may discuss matters procedural in nature, he is prohibited by the Administrative Procedure Act from discussing the merits of this case.

Pursuant to Federal Rules and Regulations, 34 C.F.R., §§ 300a.571-573 (formerly 45 C.F.R., §§ 121a.571-573), personally identifiable information must be removed from *all* correspondence, exhibits and instruments filed in this matter. Accordingly, please omit or blot out Petitioner's surname, address, etc. from all material filed.

For additional information or assistance, please contact the hearing officer at the address or telephone number noted below.

Very truly yours,

Mrs. ANNETTE HEWGLEY,
Administrative Assistant,
Office of General Counsel.

71.05 Hearings concerning handicapped students

Authority: Section 11.33, Texas Education Code, and Section 6252-13a, Vernon's Texas Civil Statutes.

These rules are intended to bring the procedures on hearings and appeals of the Texas Education Agency into compliance with Part B of the Education of the Handicapped Act as *amended* by Public Law 94-142, 20 U.S.C. Sections 1401 et seq. and the applicable federal regulations, 45 C.F.R. Sections 121a.1-121a.754. These rules supplement Rules 226.23.09.010-030, Hearings Before Local Boards, Rules 226.71.01.010-.210, Hearings and Appeals Generally, Rules 226.71.02.010-.180, Hearings of Appeals to the Commissioner, and Rules 226.71.03.010-.050, Appeals to the State Board of Education, and are intended to be applied together with those rules except where a conflict exists, in which case these rules shall prevail. Users of these rules should particularly be aware that the time deadlines for hearings and appeals involving handicapped children have been greatly accelerated to achieve compliance with the federal regulations, 45 C.F.R. Section 121a.512, which require the public agency hearing and decision to be completed within 45 days and state agency review to be completed within 30 days unless appropriate extensions of time are requested and granted.

.010 Applicability

Notwithstanding any other provision in the rules for Hearings Before the Commissioner of Education and the State Board of Education, the following rules shall be followed in any case involving a change in the identification, evaluation, educational placement or provision of a free appropriate public education to a handicapped child. In such cases, 45 C.F.R. Sections 121a.1-121a.754 shall also apply.

.020 Request for Hearing

A request for hearing must set forth in plain and concise language a substantial complaint concerning a ruling, action, or failure to act by a school official, committee, or other local administrative unit. The request must be file with the board of trustees of the district and with the commissioner of education within 15 days after the ruling, action, or failure to act forming the basis for the complaint.

.030 Hearing

A hearing officer appointed by the state commissioner of education shall conduct a hearing within 10 days of the receipt of the request for hearing. The hearing shall be recorded and transcribed by a court reporter, who shall immediately prepare and transmit a transcript of the evidence to the hearing officer, with copies to the petitioner and the board of trustees of the district. Within 15 days after the close of the hearing, the hearing officer shall prepare and transmit to the commissioner of education a proposal for decision together with the original transcript of the evidence, with copies of the proposal to the petitioner and the board of trustees.

.040 Notices to the commissioner of education

(a) *Board of Trustees.*—Within 10 days after receipt of the proposal for decision, the board of trustees shall transmit to the commissioner of education a notice stating whether or not the proposal for decision is accepted. If the proposal for decision is not accepted, the notice shall also include proposed findings of fact, proposed conclusions of law, and a proposed order reflecting the local board's view of the case.

(b) Within 10 days after receipt of the proposal for decision, the petitioner may transmit to the commissioner of education a notice stating whether or not petitioner agrees with the proposal for decision. This notice may contain proposed findings of fact, proposed conclusions of law, and a proposed order reflecting petitioner's view of the case.

.050 Appeal to the State commissioner of education.

Within 10 days after the receipt of notices from the parties, the commissioner of education shall consider the evidence, proposal for decision, and the notices from the parties, and shall render and transmit to the parties a decision based on the record made before the hearing officer.

.060 Appeal

If any party is dissatisfied with the final order of the state commissioner of education, he or she may appeal to the State Board of Education within 5 days of their receipt of the final order. The State Board of Education shall render a decision based on the record made before the hearing officer, along with any exceptions and replies, within 30 days of its receipt of the notice of appeal. Briefs may be received by the State Board of Education pursuant to the procedures on hearings and appeals of the State Board of Education. No new evidence will be received and no oral argument will be heard.

.070 State Board decision

The decision of the State Board of Education shall be rendered and announced to the parties and their counsel on the date of the hearing.

.080 Rehearing

A motion for rehearing shall be prerequisite for judicial review of the decision of the State Board of Education and must be filed within 10 days after issuance of the decision. Motions for rehearing shall be overruled by operation of law if not acted upon within 30 days after filing.

.090 Extension of time

At the request of any party, the hearing officer, commissioner, or chairman of the State Board of Education, as appropriate, may grant specific extensions of time beyond the periods set out in these rules.

.100 Filing of documents

Documents shall be deemed filed only when actually received by the designated hearing officer, state commissioner of education, or State Board of Education.

.110 Construction of rules

These rules shall not be construed so as to enlarge, diminish, modify, or alter the jurisdiction, powers, or authority of local school boards or this agency, or the substantive rights of any person.

Docket No. 148-SE-581

STEVEN G. BNF, AND BEVERLY G., PETITIONER

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, RESPONDENT

DISCLOSURE OF EVIDENCE

Before the IMPARTIAL HEARING OFFICER, TEXAS EDUCATION AGENCY

TO THE HEARING OFFICER: Pursuant to 34 C.F.R. Section 121a.5808(a)(3), Petitioners hereby disclose to Respondent the following evidence which they propose to introduce at the hearing in this case:

(1) Beverly G., Petitioner in this matter, will testify as to Steven G.'s disabilities, her efforts to obtain appropriate education services for Steven G., the procedures followed by Respondent with respect to its decisions relating to services to Steven G. and as to information discovered by her in Steven G.'s education records and will verify correspondence received by her from Respondent which correspondence and records will be introduced into evidence;

(2) Sylvia Wilson, Certified Special Education Teacher and Steven G.'s former teacher, will be called to testify as to Steven G.'s disabilities, his unique problems and individual learning characteristics, the extent of his regression upon an interruption in his education program, and his limited ability to recoup lost skills and behavior control, his other unique education needs, and the appropriate education program needed to serve such needs;

(3) John Seals, a licensed physician specializing in pediatric neurology, will be called to testify as to Steven G.'s medical history, his physiological, neurological and psychological handicaps; and the effect of these handicaps on Steven G.'s education needs and will verify and interpret records compiled by him with regard to Steven G. which records will be introduced into evidence;

(4) Linda Schule, Steven G.'s former teacher will be called to testify as to Steven G.'s disabilities, his unique problems and individual learning characteristics, the extent of his regression upon an interruption in his educational program, and his limited ability to recoup lost skills and behavior control, his other unique education needs, and the appropriate education required to serve such needs;

(5) Ira Collerain, Chief Psychologist at San Antonio State School, will be called to testify as to Steven G.'s physiological and psychological disabilities, his need for a highly structured education program, the effect of interruption in his education program and the consequential regression, loss of motivation, loss of trust and the likelihood that Steven G. may irreversably withdraw from the learning process upon repeated interruptions in his education program. Additionally, Dr. Collerain will testify as to Steven G.'s education needs and the most appropriate placement in which to serve such needs and will interpret certain medical records to be introduced into evidence;

(6) Brenda Atkins, Director of Special Education, Alamo Heights Independent School District, will be called as an adverse witness and directed to bring all records concerning Steven G. in the possession of Respondent or its agents and will be called to testify as to Steven G.'s education program and the Alamo Heights Special Education Program and will verify records compiled by Respondent with regard to Steven G. which records will be introduced into evidence;

(7) Rose Spradley, a Certified Special Education Teacher, employed by Respondent will be called as an adverse witness to testify as to Steven G.'s disabilities, her efforts and achievements towards teaching Steven G. to obtain a level of self-sufficiency consistent with his handicap, to Steven G.'s education needs and the most appropriate placement in which to serve said needs.

Respectfully submitted,

HENRY W. CHRISTOPHER, Jr.,
Attorney for Petitioner.

CERTIFICATE OF SERVICE

This Disclosure of Evidence has been hand delivered to Randolph P. Tower, Clemens, Spencer, Welmaker & Finck, Attorney for Respondent, 1806 National Bank of Commerce Building, San Antonio, Texas 78205 on this 22nd day of May, 1981.

HENRY W. CHRISTOPHER, Jr.

CLEMENS, SPENCER, WELMAKER & FINCK,
San Antonio, TX, May 22, 1981.

Re Steven Galarza.
Mr. BILL LUTTRELL,
Johnson & Christopher,
San Antonio, TX.

DEAR BILL: Enclosed please find a List of Possible Witnesses and Documentary Evidence. As stated, we will have the entire file available at the hearing. We will try to get you copies of items 3 through 5 on Tuesday, May 26.

Very truly yours,

RANDOLPH P. TOWER.

Enclosures.

LIST OF POSSIBLE WITNESSES AND DOCUMENTARY EVIDENCE

WITNESSES

Ms. Rose Spradley, Ms. Brenda Atkins, Dr. Floyd Hill, and Dr. Sandra Loucks. Each of these witnesses will offer testimony relating to the twelve-month issue.

DOCUMENTARY EVIDENCE

1. Admission, Review, Dismissal Committee Record of September 25, 1980 re: Steven Galarza (attached).
2. Report of Comprehensive Individual Assessment dated October 22, 1980 re: Steven Galarza (attached).
3. Project Vision-Up Profile Sheet for school years 1979–80 and 1980–81. This document is a graphic chart documenting skills mastered.
4. Adapted Resource Educational Plan and Student Progress Report including the following areas: (a) self-help, (b) physical development, (c) language development, (d) intellectual development, and (e) fine motor.
5. Teacher's Anecdotal Log for years 1979–80 and 1980–81. This document is a daily anecdotal record on Steven Galarza kept by Ms. Spradley.

Ms. GALARZA. Finally, I think it is important to emphasize that amendment of the act will not necessitate any additional Federal spending. What the amendment seeks is an award against the local school district when the parent prevails. Enforcement of a Federal law is thereby accomplished without spending a single Federal dollar.

By its actions, one can see that this school district in Texas has expended an enormous amount of money paying its attorneys to avoid providing the education ordered by the hearing officer, the Commissioner of Education, the U.S. magistrate and the Federal judge for my son, Steven.

I can tell you from my experience that some school districts will not provide adequate educational programs unless forced to do so.

I am grateful to all of you in allowing me to be here today. I am hopeful that my experience will cause all of you to become convinced that amendment of the act and guarantee of fees to legal representatives is essential to continued vitality of the Education of All Handicapped Children's Act.

Thank you, Mr. Chairman, and members of the committee.

[Prepared statement of Beverly Galarza follows:]

PREPARED STATEMENT OF BEVERLY GALARZA, SAN ANTONIO, TX

Mr. Chairman and members of the committee, I am Beverly Galarza of San Antonio, Texas. I am here today to testify before this Committee to tell you about my 5 year legal battle to secure the guarantees of the Education of All Handicapped Children's Act for my son, Steven, about the fact that it is impossible for myself or any parent to pursue the Act's guarantees without legal representation, and why the

Act must be amended to ensure that it is not flagrantly ignored by our school districts.

I am a single parent and have always had to work full time hours a week to support myself and my child. My only son Steven is severely handicapped due to being developmentally delayed as a result of his cerebral cortex not developing properly. Steven is 12 years old. Although he has no verbal language, Steven communicates through the use of a notebook type binder which contains approximately 13 pages of picture/word combinations and words without pictures. He is learning to make very short sentences by stringing 3 to 6 words together. Four years ago when Steven was eight years old, Steven had no means of communication, except to laugh, cry and tantrum. Since Spring of 1982, Steven's physical development has progressed from learning to crawl on his hands and knees to side stepping the length of a table; then to walking with a walker. He can now walk holding my hand and just a few months ago he began taking some independent steps. Steven is incontinent and we have been unsuccessful in our attempts to toilet training him. Without a continued, structured, and repetitive program, Steven is subject to behavorial outbursts and regression.

During Steven's pre-school years from age three to five, his progress was slow but steady thanks to a 12 month education provided through the Head Start Program. An example of the benefits of a 12 month program was that at age five when he left the program, he could stand and hold onto a little walker and move it a couple of steps. However, when he entered public school he was only provided nine months of school with no provisions for the summer months. As a consequence, after he left the 12 month Head Start Program, all of the learning Steven achieved from September to May was lost during each summer. For example, he was not able to walk with the aid of the walker again until he was ten years old.

In September, 1980, I asked my son's school to provide a 12 month school program for Steven. When officials refused, I obtained legal representation and we pursued the state administrative avenues provided by the Act. It was not until nine months later, just as school was ending in May, that our case was heard by a state hearing officer. Evidence was presented during a two day trial. Both the school and I were represented by legal counsel. Although the decision was not rendered until the end of 1981, more than a year after I requested summer schooling, the ruling was favorable to Steven. We had received what I had contended from the beginning was due my son under Federal law.

Our success, however, was short lived. In February, 1982, the school district filed suit in federal district court seeking review of the state education agency's ruling. Two years later I was once again awarded the relief I requested back in 1980. However, in the process of defending the state's ruling and this relief, my attorneys expended numerous hours briefing issues which the judge himself characterized as numerous and complex. During the course of litigation, my lawyers were successful in getting a preliminary injunction requiring the school to give my son summer school for the summer of 1983. However, this was only after the court heard five days of evidence, mostly from experts, and required legal briefing on numerous procedural and substantive issues.

In early summer of 1984, the federal court upheld the state's decision and after finding that I was the prevailing party found that I should be awarded my attorney's fees. However, before the Court was able to determine the amount of such an award and enter an order, the Supreme Court decided in *Smith* v. *Robinson*, that because Congress did not expressly state that fees were available to parties who prevailed in litigation under the EAHCA, none could be granted. Because of this decision, my attorneys were not awarded their fee by the federal court. Unfortunately, but predictably, the school has appealed the district court's order affirming the state agency's decision requiring summer school to be provided. Regardless of the appeal, I anticipate further legal battles prior to every summer session.

I am here today because I am concerned not only for what lies ahead in my case, but for those parents yet to come who may be faced with problems that cannot be resolved between the parents and school officials. I am convinced that without the Act being amended to include a reasonable award of attorney's fees to prevailing parties in any action dealing with the EAHCA, parents will be unable to challenge their school district's decisions and the Act will become an empty promise to the handicapped children of America.

Although a parent knows their child's individual needs, their knowledge and compassion do little good in the legal proceedings built into the EAHCA, when a school district attempts to escape its responsibility to educate a handicapped child. We are not equipped with law degrees or the experience that comes with being a lawyer. We are ignorant regarding procedural rules. We are no help to the courts in re-

searching cases or in interpreting and applying the law to the difficult questions posed by our cases. The courts rely heavily on the lawyers to brief cases and legal issues; a task which a parent would be helpless to perform.

Also, at the Administrative level, which is mandatory and critical, the school district will always be represented by counsel. Issues are no less complex and evidence no less important than before a court. Without an attorney parents have little chance of prevailing despite the merits of their case. I cannot conceive of a parent attempting to bring a case before a state agency or federal court alone.

The injustice faced by parents without attorneys is especially severe in a case like mine where the parent prevails at the administrative level. I was satisfied with the decision of the state education agency. I did not file a lawsuit in federal court; the school did. They have not stopped appealing and they won't. There is no incentive for them not to. I would ask that you think about the stubborness of this school district in Texas and about the children who one day may have their rights under the law violated. Each of you should consider whether any attorneys in your district would be willing or able to become involved in a long, complex, and emotional case, knowing that even if they prevail that they would not be paid for many hours and years of labor. In my particular case, my attorneys have spent over 700 hours from the fall of 1980 to the present. These concerns are clearly spelled out in a letter which I would like to submit to all of you which my attorney wrote to Congressman Bartlett at his request. The letter discusses the amount of hours spent by my lawyer both at the administrative level and in district court, as well as some of his own concerns involving the Act.

Finally, I think it is important to emphasize that amendment of the Act will not necessitate any additional federal spending. What the amendment seeks is an award against the local school district when a parent prevails. Enforcement of a federal law is thereby accomplished without spending a single federal dollar.

By its actions one can see that this school district in Texas has expended an enormous amount of money paying its attorneys to avoid providing the education ordered by the Hearing Officer, the Commissioner of Education, the United States Magistrate and the Federal Judge, for my son, Steven. I can tell you from my experience that some school districts will not provide adequate educational programs unless forced to do so.

I am grateful to all of you in allowing me to be here today. I am hopeful that my experience will cause all of you to become convinced that amendment of the Act and guarantee of fees to legal representatives is essential to continued vitality of the Education of All Handicapped Children's Act.

Thank you Mr. Chairman and Members of the Committee.

Mr. WILLIAMS. Thank you very much, Ms. Galarza, that was a frank and forceful statement and we are indebted to you for traveling here today.

Before we recognize Ms. Roberts, I want to turn the gavel briefly over to our colleague from New York, Mr. Biaggi. That will allow me to visit with some of my constituents who have been waiting patiently for 20 minutes. I will return in just a few minutes.

I understand, also, Mr. Biaggi, that you have an opening statement which you may wish to give at this time.

Mr. BIAGGI [presiding]. Perhaps I will take advantage of this opportunity to make some remarks. Although I wasn't here at the outset, we have been thoroughly conversant with this issue and have been involved in the origination of the legislation.

I think the Supreme Court decision is unfortunate. They clearly misread the intent of Congress. I guess I am one of the survivors after 10 years of the effect of this legislation. We have seen it work. We saw the problems; we saw the abuses at a time when civil rights were critical for all people. Now we witness the Supreme Court making a decision that would impede and diminish the intent of the Congress.

I also see a division in the community which was never the intent, nor was in existence when the original legislation was enacted. The beneficiaries, as we saw it some 10 years ago, would be

the children. That intent has not diminished one bit, the Supreme Court notwithstanding. That is why we are here today dealing with this legislation, to try to restate the intent of the Congress.

I think it is unfortunate. We have had some 4 million young folks who have had the protection of this act and we intend for it to continue.

I will be hearing from Ms. Roberts in a little bit; we heard the previous witness, but these are just illustrations. They are not new to me.

We hear them on a day-to-day basis and I think if we don't pursue the original intent of the authors of this legislation, we break faith with the principle of access and with the civil rights. I see this division. Some say, yes, there should be legislation—the attorney's fees paid for judicial. How about the primary stages? Oftimes, the problem is resolved in the primary stages and school districts have attorneys present, whereas the parent does not.

I don't have to tell you from a practical perspective just what a lopsided situation that can be. But even more importantly, we must understand what is your predisposition? Are you supportive of the children or aren't you? If you are going to start making divisions and rationalizing and making exceptions and distinctions, then I question, from the school community at least, that full commitment to this legislation in its original intent.

We are proceeding in a bipartisan basis and I hope we continue in this direction, but I have my own apprehensions. I see it dividing. The advocates take one position, which I support most vigorously, and they are keeping faith, whether it be for themselves or for the cause. They are keeping faith with the intent of this legislation.

The school community, the school boards who were supportive originally seem to be begging the issue in my judgment. Either you are going to give protection or you don't give protection. You don't give part-time justice. You don't give selective due process.

If you are talking about civil rights, well, then, talk about it in its full panoply of protections.

We take a dim view—or at least, I do—of any diminution of the intent of this legislation. I am just delighted to be here with my colleagues to address ourselves to the question. Hopefully, we will be able to rehabilitate the legislation so that we can provide the full protection, to Mr. Bartlett, who feels very sincerely about this, and Mr. Williams, and all of my colleagues.

I don't know where the pressures are going to come from, where the division takes place, but for those of you who think you only need assistance in the courts, let me tell you: Put yourself in this position; put yourself in the position of the parents with the children who need help, who are not wealthy, and who need the kind of protection that this legislation would give. If you can then say, "Well, yes, let's deal with the courts," then proceed. At least I will respect your commitment, but I doubt very much you would say that if you were in that position.

Don't tell me about your obligation to your financial community, to your educational system; tell me about the obligation to these young children and their parents. We all understand what happens in politics and politics runs across the whole spectrum of American

living, education community notwithstanding. Talk honestly to the issue.

Some people may have taken a different view—well, you have said it, but I am telling you where I am, and I am vigorously there. I will oppose any erosion of the legislation that we enacted and any attempt to diminish it.

[Prepared statement of Mario Biaggi follows:]

PREPARED STATEMENT OF HON. MARIO BIAGGI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, I commend you for calling this hearing today to review the Handicapped Children's Protection Act. I also want to commend you and our ranking Republican member, Steve Bartlett, for your efforts to address this issue in a bipartisan fashion.

Having served on this committee for 14 years—I want to state at the outset that I believe this to be the most important issue that this subcommittee will address in this Congress.

Why? Because the Supreme Court's decision last year in *Smith* v. *Robinson* was a frontal assault on the civil rights of handicapped children in special education.

To those of us who were involved in crafting P.L. 94-142 some ten years ago—we viewed this decision as a serious misinterpretation of congressional intent in creating this landmark legislation.

I recall when this subcommittee received testimony from parents and educators who told us about the treatment of handicapped children in schools—that they were viewed as second class citizens—with second class status.

The passage of P.L. 94-142 was a response to those horror stories. We recognized that full educational opportunity was not a right of all—and that the civil rights of these handicapped students had to be protected.

Since passage of this legislation—4 million children have received its benefits. I believe that the issues that brought us to craft this legislation a decade ago—continue to remain issues that confront us today. Chronic underfunding of this program by Congress—has placed added strains upon school systems.

However—we can not throw out the baby with the bath water. The Supreme Court's decision should not be viewed as an opportunity for us to backtrack on civil and educational rights for handicapped children. Nor should it be the reason that we tamper with a program which has served as a beacon of hope and opportunity for handicapped children and their parents.

We cannot—allow low-income parents to be denied full—and complete—access to justice under P.L. 94-142. Failure to pass a bill that reverses *Smith* v. *Robinson* will do just that. This subcommittee—in its long and distinguished history of advocacy for the disabled and handicapped—must continue to provide leadership in this area.

It is critical that we continue to assure parents—the right to be reimbursed for the costs of protecting their children's rights under the law. In my own city of New York—the landmark *Jose P.* case—which ordered the New York City School System to provide children with special education services—awarded fees to parents. Since *Smith* v. *Robinson*—No fees have been awarded. The civil rights of the 111,000 students now receiving services under the *Jose P.* mandate are severely jeopardized.

One of our witnesses today—Diana Roberts—will provide us with a personal understanding of how important it is that we work to pass legislation that will reverse this decision.

I welcome the opportunity to work with you, Mr. Chairman, in your new capacity, in seeking to address this problem in a timely and appropriate fashion.

Mr. BIAGGI. Let me settle down now.

Ms. Roberts.

STATEMENTS OF DIANA ROBERTS, A PARENT REPRESENTING THE CONSORTIUM FOR CITIZENS WITH DEVELOPMENTAL DISABILITIES, ACCOMPANIED BY JOAN HERRINGTON, A PARENT

Ms. ROBERTS. Congressman, I am Diana Roberts from New York City. I am the parent of three children, all of whom attend New York City public schools. My middle child, Sharon, who is almost 11 years old, was born with the genetic disorder called Downs Syn-

drome. Sharon also has vision and hearing deficiencies. She currently attends a special education program at P.S. 46, Queens. She receives the related services of speech and language therapy three times a week, occupational therapy two times a week and shortly, we hope, itinerant hearing services.

I have been involved in parent organizations since Sharon's birth. I am currently the chairperson of Region 3, Queens County Council on Mental Retardation and Developmental Disabilities. The thoughts I will share with you today reflect the frustrations of many parents seeking an appropriate education for their children.

I would like to thank you for this opportunity to testify on the critical issue of the adverse impact of the Supreme Court's decision in *Smith* v. *Robinson* on handicapped children and their families.

I am testifying on behalf of the Educational Task Force of the Consortium for Citizens with Developmental Disabilities, CCDD. This task force represents teachers, parents, administrators, university professors, providers of related services, and handicapped children and youth who share a common bond of commitment to the full implementation of Public Law 94-142, the Education for All Handicapped Children's Act.

Though I sit before you today as the parent of Sharon, I am representing the 4 million handicapped children who are currently benefiting from the Federal mandate of free appropriate public education.

In 1979, at the age of 5, Sharon entered the public school system in a special education classroom. During a parent/teacher conference, it was mutually agreed Sharon would benefit from occupational therapy to improve her manual skills. This would have been a continuation of services she had received in her preschool. Her pediatricians, her child development specialist, her kindergarten teacher, all concurred with this recommendation.

My local committee on the handicapped agreed and listed the occupational therapy on Sharon's IEP. When Sharon did not receive the service, I petitioned the board of education for an impartial hearing in the spring of 1981. Since there was no dispute of the facts, I entered into a stipulation agreement with the board guaranteeing that Sharon would receive occupational therapy three times a week and speech therapy three times a week.

I was relieved that Sharon would finally be receiving services. However, to my dismay, services were still not being provided in a consistent manner.

The *Jose P.* v. *Ambach* litigation was initiated in 1979 on behalf of the thousands of handicapped children like Sharon who were not receiving an appropriate education as required by the Federal law. On December 14, 1979, Judge Eugene Nickerson entered a judgment finding New York State and the city education authorities in violation of Federal law and State mandates.

The New York State Commissioner of Education had issued four separate orders attempting to bring the New York City Board of Education into compliance, and even withheld Federal funds, all to no avail. In Sharon's case, it took from October 1979 to the spring of 1982 before the board of education provided the services.

My husband and I could not afford a private attorney to help us obtain these services due to Sharon's many medical problems. We

are convinced that Sharon only received the services because of the *Jose P.* litigation.

Even with the results of the *Jose P.* decision, I struggled for 2 years through a tangled web of bureaucracy to obtain the necessary services for my daughter. It was never easy on the well-being of my family. Sharon has been receiving occupational therapy for 2 years and continues to become more active and alert as a result of improved skills.

As a result of the *Jose P.* decision, the number of children receiving special education increased from 40,000 to 111,000. There are now over 33,000 handicapped children receiving related services which enable them to benefit from their specialized education.

Judge Nickerson found defendants liable for attorneys' fees in January of 1980 and such fees have been paid by the city each year through April 1984 as part of the costs of continued legal representation of the class of handicapped children to be served under a remedial plan required by the court.

Presently, the attorneys representing the class of handicapped children meet every other week with the city's attorneys and with the representatives of the board of education for a full day of review and negotiations. No fees have been awarded since the Court's decision in *Smith* v. *Robinson.*

All parties agree that the *Jose P.* legal action has created critically needed educational opportunities for the children in New York City. Without future reimbursement for the continued legal representation for Sharon and thousands of public children like her in New York City, I cannot be assured of continued appropriate educational services.

Sharon's story is just one among several situations included in our written testimony that dramatize the immediate need for Congress to enact legislation to restore the protections afforded to handicapped children prior to the *Smith* v. *Robinson* decision.

As a parent, it is not easy to question a school district's services while enduring all that exists in the caring of a handicapped child. Parents feel ill-equipped to enforce the rights of their handicapped children under Public Law 94-142. By denying reimbursement of my attorney's fees in the future, I feel that my capacity to exercise these rights has been severely diminished.

Further, I face serious personal indebtedness in my attempt to ensure for my child what parents of nonhandicapped children take for granted; namely, a free and appropriate public education.

On behalf of CCDD education task force, we applaud your efforts in introducing this legislation. The CCDD education task force believes that these amendments to Public Law 94-142 should be for the limited purpose of clarifying what has always been the intent of Congress, to protect the educational rights of handicapped children.

We support amending Public Law 94-142 to make the award of attorney's fees available to parents who prevail in these actions and proceedings. On behalf of the CCDD education task force, we support your effort to clarify the fact that Congress intended Public Law 94-142 and section 504 to be alternative means of protection for handicapped children.

The CCDD education task force also supports your efforts to make available for public review the decisions which result from impartial administrative hearings at the local and State level with due protection for individual privacy.

Although the CCDD education task force supports the direction and goals of these amendments, we have three strong reservations. No. 1, in section 2(b), you clarify the intent of Congress to protect the educational rights of handicapped children or youth who have a parent or a guardian. The admission of coverage for handicapped children or youth who do not have a parent or guardian, but are, in fact, wards of the State leaves unprotected the most vulnerable population. We would suggest that by adding coverage for legal representative, these children would have greater protection, that their individual education needs would be met and ensure coverage for actions brought by nonprofit organizations on their behalf.

No. 2, we are concerned that your proposal would permit the reimbursement for legal representation to only court proceedings and not for costs associated with the administrative hearing. Prior to the court's decision in *Smith* v. *Robinson*, courts on occasion awarded attorney's fees to parents, including administrative hearing costs.

If the intent of this legislation is to restore remedies that existed prior to the court's decision, then section 2(b) should be amended to include in any administrative proceeding as well.

Three, finally, although we agree with the objective of creating opportunities for early resolution of disputes between parents and the school system, section 4(b) as written could impose new hardships on parents. One can't legislate cooperation. If a local educational agency is unwilling to meet with a parent, what possibilities are there for a resolution of differences by an unwilling party?

The proposed amendment does not explain what is meant by "informally." Is a record kept that will be used by the LEA attorney in the administrative hearing? Will there be a negotiator to mediate between the two parties? Who will be authorized to be present in the informal hearing?

In conclusion, in 1975, Congress took a bold step to guarantee the rights of and protections for the education of handicapped children. Today, parents, educators and school administrators agree that the impact of Public Law 94-142 has been overwhelmingly positive.

For most handicapped children and their families, the promises of the Federal mandate have become critical civil rights that have opened the doors of educational opportunity. The chilling effect of the *Smith* v. *Robinson* decision is to close the door to all but wealthy parents and deny access to justice to all others.

On this, the 10th anniversary of the Education for All Handicapped Children's Act, as a parent, I ask you to continue your commitment to handicapped children and their families.

[Prepared statement of Diana Roberts follows:]

PREPARED STATEMENT PRESENTED BY DIANA ROBERTS, PARENT, NEW YORK CITY, ON BEHALF OF THE CONSORTIUM FOR CITIZENS WITH DEVELOPMENTAL DISABILITIES TASK FORCE ON EDUCATION, ET AL.

Mr. Chairman, I am Diana Roberts from New York City. I am the parent of three children all of whom attend New York City public schools. My middle child Sharon,

who is almost 11 years old, was born with a genetic disorder called Downs Syndrome. Sharon also has vision and hearing deficiencies. She currently attends a special education program called the modified instructional services 1 program at PS 46 Queens. She receives the related services of speech and language therapy three times a week as well as occupational therapy two times a week, and we anticipate itinerant hearing services very soon.

I have been involved in parent organizations since Sharon's birth. Sharon began receiving specialized instruction when she was six months old. I am currently the Chairperson of Region 3, Queens County New York Council on Mental Retardation and Developmental Disabilities. The thoughts I will share with you today reflect the frustrations of many parents seeking an appropriate education for their children. I would like to thank you for this opportunity to testify on the critical issue of the adverse impact of the Supreme Court's decision in *Smith* v. *Robinson* on handicapped children and their families.

I am testifying on behalf of the Education Task Force of the Consortium for Citizens with Developmental Disabilities (CCDD). The CCDD Education Task Force is comprised of a number of major national organizations who are concerned about the provision of quality special education and related services to our nation's handicapped children. These organizations representing teachers, parents, administrators, university professors, providers of related services, and handicapped children and youth share a common bond of commitment to the full implementation of P.L. 94-142, the "Education For All Handicapped Children's Act."

Though I sit before you today as a parent of Sharon, I am representing the four million handicapped children who are currently benefitting from the federal mandate of a free appropriate public education. Our children's greatest hope for improvement comes when they are provided appropriate educational opportunities. I fought for and won appropriate services for my daughter and have seen her progress from an awkward child with limited manual dexterity to a child who grows increasingly more independent and is proud of her accomplishments. I want to tell you briefly my story and the psychological impact that the Supreme Court's decision in *Smith* v. *Robinson* has imposed on my family.

In 1979, at age five, Sharon entered the public school system in a special education classroom. During a parent-teacher conference in October 1979, it was mutually agreed that Sharon would benefit from occupational therapy to improve her manual skills. This would have been a continuation of the services she received in her preschool. Her pediatricians and her child development specialist along with her kindergarten teacher concurred with this recommendation. My local committee on the handicapped agreed and listed the occupational therapy service on her IEP. When Sharon did not receive the service, I petitioned the Board of Education for an impartial hearing in the Spring of 1981. Since there was no dispute of the facts, I entered into a stipulation agreement with the Board guaranteeing that Sharon would receive occupational therapy three times a week. I was relieved that Sharon would finally be receiving services. However, to my dismay, services were still not being provided in a consistent manner.

In 1979, Sharon was one of over 100,000 children with developmental disabilities in New York City who either were waiting for evaluations, were not receiving related services identified as needed by the school, or who were not in appropriate educational placements.

The *Jose P.* v. *Ambach* litigation was initiated in 1979 on behalf of the thousands of handicapped children who were not receiving an appropriate public education as required by the federal law. On December 14, 1979, Judge Eugene Nickerson entered a judgment finding New York State and the city education authorities in violation of federal and state mandates and ordered them to come into compliance with the federal law.

In Sharon's case, it took from October 1979 to the Spring of 1982 before The Board of Education provided the services. My husband and I could not afford a private attorney to help us obtain these services due to Sharon's many medical needs. We are convinced that Sharon only received the services because of the *Jose P.* litigation.

Even with the results of the *Jose P.* decision, I struggled for over two years through a tangled web of bureaucracy to obtain the necessary services for my daughter. It was never easy on the well-being of my family. Sharon has been receiving occupational therapy for two years and continues to become more active and alert as a result of her improved skills.

Prior to the initiation of the court action in New York City, thousands of children were on waiting-lists for evaluation and placement, although for eight years parents had attempted to remedy the system through administrative avenues. The New

York State Commissioner of Education had issued four separate orders attempting to bring the New York City Board of Education into compliance and even withheld federal funds, all to no avail.

Few children were receiving related services such as physical and occupational therapy and counseling. The overwhelming majority of children had no individual education program (IEP) required by the federal mandate, and placements were regularly made without parental participation in the decision-making process.

As a result of the *Jose P.* decision, the number of children receiving special education increased from 40,000 to 111,000. For the first time, a continuum of services has been created which includes the least restrictive placement options for handicapped children including over 30,000 children served in resource rooms, a program which did not exist prior to the lawsuit. For the first time, handicapped children are provided with invaluable opportunities for social interaction and growth. The Board of Education procedures have been changed to include parents in the referral, evaluation, and IEP process. Architectural barriers have been removed in over 50 school buildings and steady progress is being made toward creating another 50 accessible schools. There are now over 33,000 handicapped children receiving related services which enables them to benefit from their specialized education.

Judge Nickerson found defendants liable for attorneys' fees in January 1980, and such fees have been paid by the city each year through April 1984 as part of the costs of continued legal representation of the class of handicapped children to be served under the remedial plan required by the court.

Presently, the attorneys representing the class of handicapped children meet every other week with the city's attorneys and the representatives of the Board of Education for a full day of review and negotiations. No fees have been awarded since the Court's decision in *Smith* v. *Robinson*. All parties agree that the *Jose P.* legal action has created critically needed educational opportunities for the children in New York City. Without future reimbursement for the continued legal representation of Sharon and thousands of other children like her in New York City, I cannot be assured of continued appropriate educational services.

I want to tell you also about Barry, Amber, and Robin—three children who continue to struggle along with their families as a result of the burden imposed by the Court's decision.

When Barry's parents attempted to enroll their son in public school at age five in Savannah, Georgia, they were told he was too handicapped and not eligible for a public school program. It was not until age nine in Savannah, Georiga, after passage of Congress of P.L. 94-142, that Barry was finally admitted to a special education program. Barry is severely mentally retarded with mobility and communication difficulties. Barry's parents asked for the continuation of speech and physical therapy services during the summer months. They were told that regardless of Barry's individual educational needs, there was a statewide policy in effect that limited special education services to nine months a year. Barry's parents asked for an impartial hearing. Despite the federal mandate requiring the development of an educational program based on individual needs, the hearing officer rejected consideration of Barry's needs citing the fact that state policies do not require provision of extended school year services. Barry's parents felt that they had two options. Barry could be removed from the home and placed in the most restrictive setting of a state institution at huge and unwarranted costs to receive services year round, or they could challenge the state policy in court. Barry's parents could not afford legal representation, but recognized that the issue of extended school year services affected thousands of children across the state. The Georgia Association For Retarded Citizens filed a court action on behalf of Barry and other handicapped children in 1979. After favorable decisions at the district court level, the Court of Appeals, and last month the Supreme Court, the statewide policy of limiting related services to nine months a year has been invalidated. Unfortunately, the five year protracted court proceedings with appeals at every level by the state and local educational agency, had its impact on Barry's family. Intense public scrutiny and harassment from school officials and the press contributed to Barry's parents divorce and his subsequent placement in an institution.

Because of the *Smith* v. *Robinson* decision, Barry's legal representative was not able to recover attorneys' fees despite the fact that they prevailed. This then places a severe economic burden on the parents who make up this nonprofit organization. It should be understood that nonprofit organizations supporting parents in enforcing their rights under P.L. 94-142 do not retain any of the fees awarded to prevailing parties in P.L. 94-142 cases.

Amber is a nine-year-old child with spina bifida attending a public education program in Texas. Eight months ago, the United States Supreme Court decided that

catherization services must be provided to Amber so that she could attend school and receive the benefits of a public education. The Supreme Court decided that "services like catherization that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school." Despite favorable decisions for Amber from the district court, and Court of Appeals, the Irving Independent School District continued their challenges to the Supreme Court.

Although the Supreme Court finally ruled in Amber's favor, her family was denied the award of attorneys' fees because of the *Smith* v. *Robinson* decision. Amber's family owes her legal representatives over fifty thousand dollars and now faces the prospect of lifelong debt as a result of their successful battle to enforce Amber's rights under P.L. 94-142.

Robin is a twelve year old child in a self-contained program for children with autism in Seattle, Washington. Robin's parents, along with several other families whose children are in the program, have unsuccessfully during the past six months sought as a less restrictive placement option that affords some opportunity for social interaction with nonhandicapped children. They have considered legal action, but even as a group of families they lack sufficent financial resources to move ahead with no prospect of being reimbursed in the future if they prevail in court as a result of the *Smith* v. *Robinson* decision. Although Robin's parents feel strongly their son's educational rights under P.L. 94-142 are being violated, their ability to remedy the situation has been eliminated.

These are three among many situations that dramatize the immediate need for Congress to enact legislation to restore the protections afforded handicapped children prior to the *Smith* v. *Robinson* decision.

It is important for the Subcommittee to realize that the Court's decision places the enforcement and protection of the educational rights of handicapped children in serious jeopardy. Not only did the Court's decision determine that P.L. 94-142 does not allow the award of attorneys' fees to parents who as a last resort have gone to court to enforce their child's right to a free appropriate public education, but also for the first time that Section 504 does not offer protections generally assumed to be available to handicapped children.

As a parent, it is not easy to question a school district's services, while enduring all that exists in the caring for a handicapped child. Parents feel ill equipped to enforce the rights of their handicapped children under P.L. 94-142. By denying reimbursement of my attorney's fees in the future, I feel that my capacity to exercise these rights has been severely diminished. Further, I face serious personal indebtedness in my attempt to insure for my child what parents of nonhandicapped children take for granted, namely a free and appropriate public education.

On behalf of CCDD Education Task Force, we applaud your effects in introducing this legislation which will have a direct impact on handicapped children and their families. The CCDD Education Task Force believes that these amendments to P.L. 94-142 should be for the limited purpose of clarifying what has always been the intent of Congress—to protect the educational rights of handicapped children. We support amending P.L. 94-142 to make the award of attorney's fees available to parents who prevail in these actions and proceedings.

It is important to note that Congress has authorized reimbursement for legal representation in virtually all civil rights actions brought under federal law. It certainly was not the intent of Congress to leave unprotected the civil rights claims of handicapped children seeking opportunities to learn and better develop their potential. Before the *Smith* v. *Robinson* decision, the potential of a parent to seek court action to protect their child's right to a free appropriate public education had a significant impact on a school system's level of responsiveness to meeting the educational needs of a child. After the Supreme Court's decision, the potential of court intervention is lost to most parents of handicapped children. Most parents of handicapped children face difficult economic situations that prevent the hiring of legal counsel. Unfortunately, educational rights established under P.L. 94-142 and Section 504 become empty promises without enforcement.

The authorization of the reimbursement for legal representation to a prevailing party is not unique. There are currently over 90 separate reimbursement for legal representation provisions to promote enforcement of over 90 different federal laws. Your Amendments represent a compromise. Reimbursement will only be available to parents who prevail in court and even then at the judge's discretion.

Despite claims to the contrary, we believe these Amendments will have the effect of reducing litigation under EHA. A recent Rand Corporation study by their Institute for Civil Justice found that fewer than one percent of all children served under EHA became the subject of a formal dispute and that the ability of parents to liti-

gate is a major incentive for school systems to resolve disputes at the administrative level and avoid the high cost of litigation.

On behalf of the CCDD Education Task Force, we support your effort to clarify the fact that Congress intended P.L. 94-142 and Section 504 to be alternative means of protection for handicapped children. By reestablishing the complimentary relationship between P.L. 94-142 and Section 504 that was in existence prior to the *Smith* v. *Robinson* decision, you have reaffirmed the role of the Office for Civil Rights in investigating and resolving complaints concerning the provision of a free appropriate public education in primary, secondary and vocational education programs. As a result of this clarification, there should be no question about the intent of Congress to guarantee to handicapped children the civil rights which are available to the rest of our nations's citizens.

The CCDD Education Task Force supports your effort to make available for public review the decisions which result from impartial administrative hearings at the local and state level with due protection for individual privacy. This amendment should help encourage earlier resolution of disputes between parents and school systems and improve the substantive and procedural quality of administrative hearings and reviews under the Act. We believe that this public access provision will enhance the ability of all concerned parties to monitor the provision of a fee appropriate public education for all handicapped children.

Although the CCDD Education Task Force supports the direction and goals of these Amendments, we have three strong reservations.

1. In Section 2 (B) you clarify the intent of Congress to protect the educational rights of handicapped children or youth who have a parent or guardian. The omission of coverage for handicapped children or youth who do not have a parent or guardian, but are in fact wards of the state, leaves unprotected the most vulnerable population. Children who are wards of the state are least able to assert their right to a free appropriate education. The state is also the most unlikely party to articulate the unmet educational needs of handicapped children who are wards of the state when meeting such needs will be costly and show that they are out of compliance with the federal mandate. We would suggest that, by adding coverage for legal representatives, these children would have greater protection that their individual education needs would be met.

2. We are concerned that your proposal which would limit reimbursement for legal representation to only court proceedings and not for costs associated with the administrative hearing. Prior to the Court's decision in *Smith* v. *Robinson*, courts on rare occasions awarded attorneys' fees to parents including administrative hearing costs when the court felt that the school system's position was totally lacking in merit. This serves as an incentive to school systems to settle disputes at the earliest possible time. If the intent of this legislation is to restore remedies that existed prior to the Court's decision, then Section 2 (B) should be amended to include in any administrative proceeding as well.

3. Finally, although we agree with the objective of creating opportunities for earlier resolution of disputes between parents and school system, Section 4 (B) as written could impose new hardships on parents.

One can't legislate cooperation. If a local educational agency is unwilling to meet with a parent, what possibilities are there for a resolution of differences by an unwilling party? The proposed amendment does not explain what is meant by meeting informally. Is a record kept that will be used by the LEA attorney in the administrative hearing? Will there be a negotiator to mediate between the two parties? Who will be authorized to be present at the informal meeting? What sanctions will be available to the parent who is not provided an opportunity for an informal meeting because the LEA refuses to participate? It is essential that the timeliness of the procedural safeguards section not be undercut by this meeting.

In 1975, Congress took a bold step to guarantee the rights of and protections for the education of handicapped children. Today, parents, educators, and school administrators agree that the impact of P.L. 94-142 has been overwhelmingly positive. For most handicapped children and their families, the promises of the federal mandate have become critical civil rights that have opened the doors of educational opportunity. The chilling effect of the *Smith* v. *Robinson* decision is to close that door to all but wealthy parents and deny access to justice to all others.

We urge the Congress to move ahead and pass legislation that responds to the specific issues raised by the Supreme Court in *Smith* v. *Robinson*. As stated by Justice Brennan in his dissent to the Court's decision, "Congress will have to take the time to revisit the matter. Until it does, the handicapped children of this country whose difficulties are compounded by discrimination and other deprivations of constitutional rights will have to pay the costs. It is at best ironic that the Court man-

aged to impose this burden on handicapped children in the course of interpreting a statute wholly intendead to promote the educational rights of those children." On this, the tenth anniversary of the enactment of the "Education for All Handicapped Children's Act", as a parent, I ask you to continue your commitment to handicapped children and their families.

Mr. WILLIAMS. Thank you very much.

Mr. Bartlett.

Mr. BARTLETT. Thank you, Mr. Chairman.

Ms. Galarza, first of all, I want to publicly thank you, as I have in the past, for your insistence and your sincerity, and today, in particular, your articulation of the issues. It was in many ways your persistence and your ability to cut through the legalese that has helped many Members of this Congress to come to where we are today. I personally have a great deal of gratitude to you for what you have done on this issue, both with regard to your own child, as well as changing the law.

I think we have included the letter that your attorney had shared with me and we will include that in the hearing record today.

I do have a concern—and I just want you to reaffirm—your attorney told me on the telephone that—I was very concerned, as you know, about the time limit, the intent of the due process, or the administrative hearings process, is that, in layman's terms, is that a parent be afforded an informal and a timely administrative hearing with a chance for an appeal one step up to the State Education Agency and clearly have a set of very narrow time limits.

I think one of them is 45 days at the most, and yet, you began the process in September 1980. You didn't get your hearing until May 1981. It was a 2-day hearing and then you didn't get a judgment until December 1982 and then the school district filed suit on you in February—I am sorry, December 1981, 9 months later.

Your attorney has told me that he is satisfied that one of the issues in your case resolved that time limit for certain. That is to say, that no additional Federal laws are required to ensure that a future parent would have a narrow time limit. Are you satisfied as to that? It seems to me that the biggest burden you had to carry was that you won at every step of the process, but your child, after 4 years or longer, was still not afforded what you were legally entitled to.

Ms. GALARZA. Yes; I can clarify what happened in that process. When the school first denied the services in September, my attorney began negotiations between himself and myself and the school district to try to negotiate this and work out a settlement before we had to go before a due process hearing. He was optimistic that he thought that it could be reached because he thought that this was something that the law provided for, that there was really no question. He was not familiar with the Education of All Handicapped Children's Act and to address that for himself and it took 7 months before we realized that the school was not going to settle with us.

So that is where that timeframe is; we tried to negotiate and were unsuccessful, so we asked for the due process hearing.

Mr. BARTLETT. But then in May 1981, you received your due process hearing. Tell us what kept you from getting a decision until De-

cember 1981 because the law clearly provides for a 45-day time limit.

Ms. GALARZA. What may have happened, and I am not sure if this is the answer, is that we were caught up in a procedural change. When the hearing officer made his proposal for decision, it was sent to the commission of education. Then he had to rule on it because the school didn't agree with the hearing officer. Then the commissioner of education entered his order, but at that very time, right after he did, the procedure changed to where whatever the hearing officer's determination, it would be the final step. So they remanded back to the hearing officer so it took some time in there when we got caught up in these procedural changes.

Mr. BARTLETT. Ms. Galarza, I have visited with the chairman, the sponsor of the bill, on this and we want to be very, very careful, either within this statute or in the report language, that we make it clear that when the statute says 45 days and then 30 days, that that is what the intent is and not a stretched-out period of time waiting for people to make decisions.

It is Congress' intent that it would be made within a matter of days within the time that the administrative hearing is held, and I do appreciate you and your attorney providing us with the information as to what happened in that case so we can build into either the law or the legislative record to make sure that it does not happen with future cases.

It sounds as if we had a mediation or an informal—you had mediation or you had informal exchanges—if we had that component in this bill, it may not have helped you in your situation, but you would urge us, then, to—whatever we do—to keep the time limit in so that the due process would start on time.

I assume that you wouldn't want to see a mediation component put in in addition to the other time?

Ms. GALARZA. Absolutely not because we lost a summer as a result of that.

Mr. BARTLETT. I have two questions for Ms. Roberts. First of all, just in terms of clarification—and we can look at this. You raised some interesting points. It is my understanding that existing regulations, the regulation 300.10, that the term "parent," the definition of "parent" would include the definition here, and the term parent means a parent, a guardian, a person acting as the parent of a child or a surrogate parent and there is a further comment that the term parent is defined to include persons who are acting in the place of a parent, such as a grandmother or stepparent with whom the child lives, as well as persons who are legally responsible for a child's welfare.

So I think it is the committee's intent to define parent broadly as that person who is responsible for the child. Does that address your concerns with the language of limiting the attorney to represent the parent?

Ms. ROBERTS. Are we talking about—you are talking about section 12(b)?

Mr. BARTLETT. Yes.

Ms. ROBERTS. All right. When a nonprofit organization takes on a case—in my case, Advocates for Children took on my case, and for them to be able to be covered—many of the agencies take on cases

like this and they are out the money because they are not the legal guardians or the parents of the child. So we would like to include coverage for actions brought by nonprofit organizations on their behalf.

Mr. BARTLETT. On behalf of the child.

Ms. ROBERTS. On behalf of the child.

Mr. BARTLETT. I understand. I think, at least from my perception, I would like to have the parent always have the final say in what the legal decisions that the attorney makes, and not someone else.

You also had some questions which is a matter of—they are good to raise—as a matter of legislative history, at least from my understanding, I would help to answer them for the record today so that we can establish legislative history.

On page 12 of your testimony, you ask, "Is a record"—and these are with regard to the informal meetings between the parent and the school board—what is meant by meeting informally? "Is a record kept that will be used by the LEA attorney in the administrative hearing?" The answer, as far as the intent of the bill, no.

Number two is "Will there be a negotiator to mediate between the two parties?" The answer is not necessarily unless both parties want a mediator.

Number three is "Who will be authorized to be present at the informal meeting?" The parent and the school board would both choose their own sides.

Number four is what sanctions will be available to the parent who is not provided an opportunity for an informal meeting." We haven't included any sanctions in this.

I guess the last is, "Will the timeliness of the procedural safeguard section not be undercut by this meeting?" The answer is no; it is our intent that the timeliness would continue on, or the time limits would continue on and the informal meetings would be in addition to that, but not to add to the time constraints.

I yield back the balance, Mr. Chairman.

Mr. WILLIAMS [presiding]. Mr. Biaggi.

Mr. BIAGGI. I have no questions. The witnesses have spoken very well and their stories deliver the message.

Mr. WILLIAMS. The Chair would like to note that Joan Herrington is accompanying Ms. Roberts here today and both are parents representing the Consortium for Citizens with Developmental Disabilities. The Chair also notes a fourth presence at the table today, whom I believe is Sharon Roberts. Her witness here today is not missed.

Ms. Galarza, again, your testimony was forceful and very frank. You refer to this ordeal as 5 years of battle. One statement in your testimony particularly stood out for me, and perhaps it is not entirely inappropriate for me to read it back to you.

The injustice faced by parents without attorneys is especially severe in a case like mine where the parent prevails at the administrative level. I was satisfied with the decision of the State Education Agency. I did not file a lawsuit in Federal court, the school did. They have not stopped appealing and they won't. There is no incentive for them not to.

I would ask that you think about the stubborness of this school district in Texas and about the children who 1 day may have their rights under the law violated.

Your traveling here to present your testimony is not lost upon this committee. It is valuable and speaking for both sides here, we want you to know that it is the full and complete intention of this committee to right the wrongs, pass legislation to see that they don't happen again, and to level the field for handicapped children and their parents. As you travel back home, we want you to bear in mind the value of your testimony and your 5-year battle. You have impressed your congressman and others from Texas and you have impressed this committee.

Ms. Roberts, you mentioned that the change in language from parent or legal representative to parent or guardian might eliminate protection for handicapped children who are wards of the State, but I do want to point this out, as much for you as for the record, because I believe it is important.

Under the statute, the term parent is interpreted to include the child's real parents, a legal guardian or a court-appointed surrogate parent if the child is a ward of the State, and under existing regulations, regulation 300.10, a parent is defined as follows: As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child or a surrogate parent who has been appointed, in accordance with the regulation 300.514. The term does not include the State if the child is a ward of the State.

We very much appreciate—Mr. Biaggi, did you place your statement in the record yet?

Mr. BIAGGI. I made my few remarks. [Laughter.]

Mr. WILLIAMS. Did he? I am not at all surprised.

We very much appreciate the testimony of all of you today and the attendance of those here.

[Prepared statement from the Association for Persons With Severe Handicaps follows:]

PREPARED STATEMENT FROM THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS

The Association for Persons with Severe Handicaps wishes to thank this Subcommittee for the interest in children with handicapping conditions as expressed in H.R. 1523 and for these timely hearings. TASH joins with you in a long-standing interest in protecting the rights of individuals with handicaps to the access of free and appropriate education and a full participation in our society. We strongly feel that passage of this legislation will reaffirm the rights and protections available to children who experience handicapping conditions under PL 94-142 and Section 504 prior to the court's decision.

Legal protections should not be limited only to parents who can afford legal representation. Despite the progress that has been made in expanding educational opportunities for children who experience handicaps there are still problems with the provision of appropriate special education programs and related services in some school districts. This bill has the limited purpose of clarifying what has always been the intent of Congress in protecting the educational rights of children who are handicapped.

As you are aware, this legislation has a direct impact on over 4 million children and their families. Before the *Smith* v. *Robinson* decision the potential of a parent to seek court action to protect their child's rights to a free and appropriate public education had a significant impact on a school system's level of responsiveness. This level of responsiveness has diminished as a result of the court decision.

It is clear to us that passage of this legislation is critical. Delays in the consideration of this bill will negatively impact children in every school district in every state. Program and placement decisions will continue without challenge as to their appropriateness as parents will not have the means to question the decisions of their school systems. Simply stated, the educational rights established under Public Law 94-142 and Section 504 become empty promises without reinforcement.

There have been three concerns with the Handicapped Children's Protection Act raised by the Consortium for Citizens with Disabilities. We fully support the CCDD's efforts relative to children who are wards of the state, the limitation of attorney's fees to court proceedings and the language in Section 4(B) that discusses informal complaint procedures.

We would like to see as a part of this measure language affirming the inclusion of children without parents or guardians under the protection of this Act.

As pointed out in the CCDD testimony, while rare indeed, there are occasions when a school system persists all the way to court with cases totally without merit. The parents must have legal counsel in such cases through the entire proceeding, and the opportunity for court-awarded attorney's fees for the proceedings in their entirety should not be precluded.

Certainly, it is in the best interest of all parties to settle the disputes out of the court room. We support efforts to encourage such settlements. However, the effect of the language in the bill could indeed prove detrimental to parents who are faced with a school district's refusal to mediate prior to litigation. We would encourage the Subcommittee to address the questions raised by the Consortium when the legislation is being marked-up.

TASH, a coalition of members strongly interested in issues impacting upon the lives of citizens who experience handicapping conditions realizes deeply the importance of these critical laws and promises. Our members have readied themselves to meet the challenges necessary to offer children with handicaps the same rights and privileges extended to their peers without handicaps. We as individuals and as a group of well over 5500 stand ready to assist in any way with the passage of this legislation. We cannot state strongly enough our awareness that this bill must be moved to protect the rights of children with handicapping conditions.

Thank you again for your concern and please know that you can count on us for continued support.

Mr. WILLIAMS. This hearing is concluded.

[Whereupon, at 3 p.m., the subcommittee was adjourned, to reconvene subject to the call of the Chair.]

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